10-2146(L)

To Be Argued By:
FELICE M. DUFFY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-2146(L)
10-2265 (CON), 10-3415 (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

MICHAEL E. STINSON, DAVID R. HARVIN,
EUGENE STINSON, aka Nasty,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

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Statement of Jurisdiction

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Janet B. Arterton, J.), which had subject matter jurisdiction over these criminal cases under 18 U.S.C. § 3231.

On March 9, 2010, a jury found the defendant-appellant Eugene Stinson ("Eugene") guilty of conspiracy to steal firearms from a federally licensed firearm dealer, in violation of 18 U.S.C. §§ 922(u)(1), 924(i)(1) and 371; and theft of firearms from a federally licensed firearm dealer, in violation of 18 U.S.C. §§ 2, 922(u)(1) and 924(i)(1). (EA8; GA1033-36).[1] On August 16, 2010, the district court sentenced Eugene to 120 months in prison. (GA1219). Judgment entered on August 18, 2010. (EA10). On August 23, 2010, Eugene timely filed a notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(A). (EA10, EA104). This Court has appellate jurisdiction over Eugene's challenge to his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

On March 9, 2010, a jury found the defendant-appellant Michael Stinson ("Michael") guilty of conspiracy to steal firearms from a federally licensed

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[1] References are as follows:

Michael Stinson's Appendix . . . . . .("MA__").
Eugene Stinson's Appendix . . . . . ("EA__").
Government's Appendix . . . . . ("GA__").

firearm dealer, in violation of 18 U.S.C. §§ 922(u)(1), 924(i)(1) and 371; theft of firearms from a federally licensed firearm dealer, in violation of 18 U.S.C. §§ 2, 922(u)(1) and 924(i)(1); and possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (MA11; GA1033-36). On May 28, 2010, the district court sentenced Michael to 200 months in prison. (GA1219). Judgment entered on June 10, 2010. (MA14-15). On June 8, 2010, Michael timely filed a notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(A). (MA13-14, 252). This Court has appellate jurisdiction over Michael's challenge to his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Did the court plainly err or violate Eugene's substantial rights in the way in which it handled two evidentiary objections raised during Michael's direct testimony, where its handled these objections exactly as Eugene's trial counsel requested?

II. Viewed in the light most favorable to the verdict, was there sufficient evidence to support the jury's conclusion that Michael was not entrapped?

III. Did the court properly find by a preponderance of the evidence that Michael Stinson's two first degree robbery convictions and one first degree burglary conviction were crimes of violence, resulting in his classification as an armed career criminal under 18 U.S.C. § 924(e)?

IV. Was the district court's non-Guidelines sentence of 200 months' incarceration for Michael, which was ten months below the bottom of the applicable Guidelines range, substantively reasonable?

V. Do any of Eugene's *Pro Se* Claims Have Merit?

A. Did Eugene waive any due process challenge that could have been raised in a motion to suppress the evidence or a motion to dismiss the indictment?

B. Viewed in the light most favorable to the verdict, was there sufficient evidence to support the jury's verdict?

C. Did Eugene waive any claim that the Government did not comply with its discovery obligations?

D. Did the court plainly err in admitting predisposition evidence against Eugene and was there sufficient evidence to support the jury's conclusion that Eugene was not entrapped?

E. Did the court make any errors in its sentencing guideline calculation, which included enhancements for role and for the possession of twenty-nine firearms?

F. Did the court err in denying Michael's motion for a mistrial based on alleged prejudicial publicity during trial?

VI. Do any of Michael's *Pro Se* Claims Have Merit?

A. Did Michael waive any constitutional and/or jurisdictional challenges that could have been raised in a motion to suppress the evidence or a motion to dismiss the indictment?

B. Did Michael waive any claim that the Government did not comply with its discovery obligations?

C. Did the court plainly err in addressing or failing to address several alleged evidentiary errors raised for the first time on appeal?

D. Did any of the Government's comments during closing argument deprive Michael of a fair trial?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In September 2009, agents and task force officers from the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") began an investigation into the theft of numerous firearms from American Precision Manufacturing ("APM"), a federal firearms licensee, located in Ansonia, Connecticut. That investigation revealed that an APM employee, Ameed Stevenson, helped Eugene orchestrate the theft by providing detailed information about when,

where and how to access APM, and the location of the firearms inside the business. ATF arrested Stevenson and, with his cooperation, set up a controlled theft of twenty-nine additional firearms with Eugene from APM. On October 22, 2010, after planning the theft, Eugene sent his father, Michael, and his father's friend, David Harvin, to APM in the middle of the night to steal the firearms. ATF arrested Michael and Harvin as they were loading sixteen of the 29 firearms into their car, and arrested Eugene the following morning.

After a three-day trial, a jury convicted Eugene and Michael of conspiring to steal, and of stealing, 29 firearms from a federally-licensed firearms dealer. The jury also convicted Michael of being a felon in possession of those firearms. Harvin had pleaded guilty to these charges just prior to closing arguments. The court sentenced Eugene to a total effective term of 120 months' imprisonment, Michael to a total effective term of 200 months' imprisonment, and Harvin to a total effective term of 120 months' imprisonment.[2]

In this consolidated appeal, Eugene raises one claim, and Michael raises four claims. Eugene alleges that the district court committed plain error in failing to provide curative instructions and failing to strike certain testimony that Michael gave in his own defense. Michael claims that the verdict was not supported by sufficient evidence

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[2] Harvin's counsel has filed an *Anders* brief, and the Government has filed a separate motion for summary affirmance as to Harvin's appeal.

because the jury should have credited his entrapment defense. Michael also challenges his 200-month sentence both because the district court erred in concluding that he was an armed career criminal under 18 U.S.C. § 924(e) and because the sentence itself was substantively unreasonable. In addition, Eugene and Michael raise a myriad of *pro se* claims, most of which are not preserved For the reasons that follow, these claims have no merit and the defendants' convictions and sentences should be affirmed.

Statement of the Case

On October 28, 2009, a federal grand jury returned a four-count indictment against the defendants in this case charging them each with conspiracy to steal firearms from a federally licensed firearms dealer, in violation of 18 U.S.C. §§ 922(u), 924(i)(1) and 371, and theft of firearms from a federally licensed firearms dealer, in violation of 18 U.S.C. §§ 2, 922(u) and 924(i)(1). The indictment also charged Michael and Harvin each with being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (EA3, EA12-22; MA5, MA17-27).

On February 18, 2010, Michael filed a notice of his affirmative defense of derivative or vicarious entrapment. (MA9, 28). In response, on February 22, 2010, Eugene and Harvin filed motions to sever the trial, claiming that Michael's affirmative defense presented an antagonistic defense. (EA7). On February 26, 2010, the court held an evidentiary hearing as to the validity of Michael's

proposed defense. (MA10; EA7; GA1-84). After the hearing, the court ruled that there was insufficient evidence to allow Michael to raise a derivative entrapment defense, but that he could raise a direct entrapment defense. (GA11-50, 62, 67, 69-71, 79).

On March 1, 2010, Eugene filed a notice of his affirmative defense of direct entrapment. (EA7). That same day, the court held a telephonic conference, during which Eugene and Harvin both withdrew their motions to sever because there were no longer antagonistic defenses in the case. The court then denied the motions to sever as moot. (EA8; MA10; GA127-40).

On February 23, 2010, the Government filed a notice advising Michael that, based on his multiple prior felony convictions for crimes of violence, he faced a mandatory minimum penalty of 180 months in prison and a maximum penalty of life in prison if convicted on the felon-in-possession count. MA9 (docket entry). On March 4, 2010, a jury trial commenced on the charges in the indictment. (EA8; MA11). On March 8, 2010, at the conclusion of the evidence, but prior to summations, Harvin pleaded guilty to the charges against him. (GA637). On March 9, 2010, the jury returned guilty verdicts as to Michael and Eugene on all of the charges in the indictment. (GA1033-36).

On May 28, 2010, the court (Janet B. Arterton, J.) sentenced Michael to 200 months in prison and three years of supervised release. (MA14-15). Judgment entered on June 10, 2010, *id*., and on June 8, 2009, Michael filed a

timely notice of appeal, (MA13).

On August 16, 2010, the court (Janet B. Arterton, J.) sentenced Eugene to 120 months in prison, and three years of supervised release. (EA10). Judgment entered on August 18, 2010, *id*., and on August 23, 2010, Eugene filed a timely notice of appeal, (EA10).

The defendants are presently serving their sentences.

Statement of Facts

Based on the evidence presented by the Government at trial, the jury reasonably could have found the following facts:[3] in late August 2009, numerous assault rifles were stolen from American Precision Manufacturing ("APM"), a federally licensed firearms dealer. (GA173, 180-81, 327-330, 445-46). In late August and September 2009, state and federal law enforcement officers recovered at least eight of those stolen APM firearms during seizures

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[3] At trial, during its case-in-chief, the Government presented eight consensually-recorded telephone calls and conversations, (Ex.4A-G), a videotape of the charged theft, (Ex.1-J), the testimony of one cooperating witness (Ameed Stevenson), (GA394-578), physical exhibits, including over thirty seized firearms, (GA625-26), and the testimony of law enforcement officers, including testimony about the controlled theft of firearms, (GA161-283, 579-628, 666-733), testimony about the firearms' interstate nexus, (GA 380-393), and testimony regarding toll records of the defendants' phones. (GA682-686).

and controlled purchases in Bridgeport, Connecticut. (GA166-69). ATF learned that all of the recovered firearms were coming from APM and began investigating how the thefts had occurred. (GA166-173).

In late September 2009, Ameed Stevenson, an APM employee, confessed to ATF that he had a role in the theft of firearms from APM. (GA186, 445-50). Among other things, Stevenson told ATF that he had given detailed information to Eugene in August 2009 regarding the layout and operational methods of APM, (GA193, 446-47), including the key fact that there was a door at the APM warehouse which could be accessed from the outside, was left unlocked, and led to the room where the firearms were kept. (GA192; 419). Stevenson also told Eugene that the third shift was the best time to steal the guns. (GA419-20).

On October 19, 2009, Stevenson pleaded guilty to aiding and abetting Eugene in stealing firearms from APM, in violation of 18 U.S.C. §§ 2, 922(u) and 924 (i)(1), and also entered into a cooperation agreement with the Government. (GA201, 396-97, 455; Ex.3A). On that same day, Stevenson was released on bond to cooperate with ATF in an attempt to recover the stolen APM weapons. (GA202, 397-98; 455). Even after the August 2009 theft, Eugene had continued to try to obtain information from Stevenson about additional shipments of firearms to APM. (GA200-01).

On October 19, 2009, Stevenson, under the direction and supervision of ATF, engaged in a recorded phone call with Eugene. (GA215-16, 456-57). Stevenson stated, "[R]emember I was telling you before about that opportunity I had," (GA458, Ex.4A), referring to a previous conversation Stevenson had with Eugene about how to get into APM to steal guns. (GA458-59). Eugene told Stevenson to go to Eugene's apartment at P.T. Barnum Housing Complex in Bridgeport, Connecticut, ("P.T.") to tell him about it. (GA459). Stevenson went to Eugene's apartment, under the direction and supervision of ATF, and met with Eugene. (GA459-60). During that recorded conversation, Stevenson told Eugene that there would be guns available to be stolen from APM and told him where, when and how to access APM. (GA217, 220-23, 461-69; Ex.4B). Eugene replied, "You got to tell me the whole set up," (Ex.4B), "I want you to show me . . . the best time to go there," (GA467), and "show me tomorrow." (GA217, 221-23, 467-69; Ex.4B).

The next morning, Stevenson, in the presence of ATF, placed a recorded call to Eugene's cell phone and asked him if he wanted to meet at APM. (GA218-19; Ex.4C). ATF had been doing surveillance in the vicinity of APM and observed a red Dodge Charger, suspected of being Eugene's car, traveling on a street directly behind APM. (GA218, 220, 472-73). Stevenson asked Eugene if he was up in the area now, and Eugene responded, "Yeah, where you at?" (GA471; Ex.4C). The two then made arrangements to meet at APM. (Ex.4C).

Shortly thereafter, Stevenson, wearing a recording device and under ATF surveillance, met with Eugene at APM on the sidewalk in front of the facility. (GA222, 474, 475). The two then walked behind the APM warehouse. (GA222-23, 475-76). While in the back of the facility, Eugene and Stevenson talked about the best time to steal the guns, the different ways to enter the APM building, and the person or people Eugene should send to steal the guns. (GA476-80). Eugene said,

> I would have to send somebody I feel comfortable with going in there. Not only that. That's serious. Let's say if a mother fucker gets caught that's serious. You talk about being caught with toast.[4] Now that's federal. A mother fucker is gonna give you up. Know what I mean? Like it sounds simple. Don't get me wrong. I would rather mother fucker go in there rather than me but at the same time.

(GA478-79; Ex. 4D). Stevenson suggested to Eugene that he use a "dope fiend." (GA479; Ex. 4D). Eugene then clarified, "You say there are two doors and then to the right." (Ex.4D). Stevenson responded by giving detailed directions to the area where the firearms were being stored inside the facility. (GA222, 223, 476).

After this meeting, ATF became concerned that Eugene would enter APM on his own and, therefore, directed Stevenson to call Eugene and set up the theft for that same

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[4] Stevenson explained that "toast" is street parlance for firearms. (GA478).

night, rather than the following night, which had been the original plan. (GA223, 224, 225, 226, 481, 589). Stevenson then placed a recorded call to Eugene. (GA225, 481; Ex.4D-1). He told Eugene that he would be coming back to work that night and would be there until 4:00 a.m. (GA481; Ex.4D-1). Eugene responded, "Oh, you're gonna be there." (Ex.4D-1). Stevenson said he would be working on a machine. Eugene responded, "Yeah, It's set up for . . . I'm setting it up now." (GA482; Ex. 4D-1). Eugene then asked, "Well, who else gonna be there with you?" Stevenson responded that he would be alone, and Eugene said, "Oh, okay, all right." (Ex.4-D1). Stevenson explained that the firearms were being prepared for shipment on Wednesday, October 21, 2009 between 5:00 and 5:30 a.m., rather than on Thursday, as they had originally discussed. (GA225; Ex4D-1). Eugene responded, "Ah, shit, I thought you said Thursday they were coming." (GA482; Ex. 4D-1). Stevenson said that the shipment had been "changed up." *Id.*

In the afternoon of October 20, ATF agents set up surveillance inside and outside APM and on the surrounding streets, in preparation for Eugene's anticipated theft of firearms. (GA588-90). At around midnight, due to safety concerns, ATF instructed Stevenson to call Eugene and tell him to enter APM through a different door. (GA485-86, 591-92, 598-600). The two engaged in the following recorded conversation:

> Stevenson: Remember the door I showed you in the back right?

Eugene: Yeah.
Stevenson: Well don't go through that door. There is going to be a smaller door on the right hand side where those yellow canisters is at.

Eugene: Right.

Stevenson: That door will bring you right into the room so you don't have to worry about turns and all that . . . but, um listen. It, it, it, it gotta be done by like, has to be done before four o'clock though.

Eugene: Right. . .yeah . . . yeah . . . don't worry . . . it is.

Stevenson: Yeah.
Eugene: But listen. So you said the middle one right? Boom!

Stevenson: Naw.

Eugene: The middle one.

Stevenson: Naw. Don't go through that one. Go to the one the right hand side that big door don't even . . . don't worry about that one.

Eugene: Okay.

Stevenson: Go through the small door and go up the steps. You are going to see a yellow bin.

Eugene: Okay.

Stevenson: There are a lot of gas cans in it. There is one door. Turn that knob and you will be able to come right in.

Eugene: Okay.

Stevenson: I'm gonna leave it open.

Eugene: All right. All right.

Stevenson: Okay.

Eugene: Yup.

(Ex.4F).

On October 21, 2009, at 1:38 a.m., ATF observed the same red Dodge Charger from the previous day and a Silver Altima, staking out APM. (GA230, 604-05, 716). At 1:55 a.m., the Silver Altima, having left the area with the Charger, returned to APM on its own. (GA231, 719). Michael got out of the front passenger door of the Silver Altima and attempted to open the wrong door to APM. (GA720). He got back into the car, and the Silver Altima drove away. (GA721). Minutes later, Stevenson received the following call from Eugene, which was recorded:

Eugene: The door ain't open.

Stevenson: Yeah it is you went to the wrong one

then. Because . . .

Eugene: The one on the right. You said the little one on the right.

Stevenson: Yeah the little one on the right. Right next to, to the yellow cages. There is a yellow cage with gas cans in there.

Eugene: I'm talking about on the side. You know the middle shutter and the one to the right.

Stevenson: No.

Eugene: The first door?

Stevenson: Not that one. Nah, nah, you have to back up. Back up, on the same walkway.

Eugene: Uh huh.

Stevenson: Yeah.

Eugene: And where is that?

Stevenson: It's in the back where the yellow cabinets is at. I'm going to open it right now.

Eugene: All right, but . . .

Stevenson: It's already, It's already open . . . huh?

Eugene: But the one you told me. Where the shutter thing you told me and that little one to the right. Not that one?

Stevenson: No not that one. When you on that walkway you come down and you're going to see a yellow fence, a yellow cage. And you're going to see a, a, a, a, a little gas containers in there. And there is a door right to the right.

Eugene: All right. And it's, and it's um, and that's open.

Stevenson: Yeah.

Eugene: And then you go through there and what you gotta do go up steps?

Stevenson: Right. You want me to open the big door?

Eugene: How many steps do you gotta . . . how many steps you gotta go up?

Stevenson: It's like, It's like three or four.

Eugene: All right then to the right is another door.

Stevenson: Right. That's the one.

Eugene: All right. And right through that door is where it is at.

Stevenson: Yeah.

Eugene: All right just, just be watching your phone cause I may have to call you back.

(Ex.4G).

Minutes later, the Silver Altima returned to APM. (GA231-32, 721-22). Michael, the passenger, and Harvin, the driver, got out of the car. (GA722). Stevenson opened the door to APM for them and showed them to the back of the room where all of the firearms were being stored. (GA489-90, 610). The two entered the building wearing knit gloves; Harvin was also wearing a green and black camouflage mask. (GA490, 611, 620-621). They loaded twenty-nine APM 7.62 x39 millimeter, semi-automatic rifles into four duffle bags. (GA232, 490-492, 723-24). This was observed by ATF and captured on videotape by APM's security camera. (Ex.1-J; GA605-614).

Michael and Harvin then exited APM with two duffle bags containing sixteen firearms and began placing one of the bags into the trunk of the Silver Altima. (GA725-26). ATF then moved in and arrested them both. (GA233, 614, 727-728). ATF seized the firearms that were in the duffle bag in the trunk of the car, the firearms in the duffle bag that was on the ground outside the car, and the remaining firearms that had been packed into the two additional duffle bags that were left inside APM. (GA618-19, 625-28).

At the same time, law enforcement officers attempted to locate the red Dodge Charger and Eugene, but could not. (GA235-36, 669-70). The next day, ATF obtained a federal arrest warrant for Eugene and arrested him at his apartment. (GA235-36, 670-71).

Summary of Argument

I. The district court did not plainly err in how it handled two evidentiary objections raised by Eugene during Michael's direct testimony. The court sustained the first objection before Michael could answer the question and offered to strike Michael's answer and give a curative instruction in response to the second objection, which was raised after Michael had already answered the question. Moreover, the testimony at issue did not affect Eugene's substantial rights or the outcome of the trial because it was entirely consistent with Eugene's direct entrapment defense.

II. There was sufficient evidence to support the jury's conclusion that Michael was not induced by the Government to commit the crime when Stevenson testified that he had no contact with Michael before the theft and was surprised to see him at APM on the night of the theft, and that Michael was predisposed to commit the crime based on the fact that he did not hesitate to steal the firearms when Stevenson showed him where they were and on his prior convictions for robbery with a gun, burglary, and possession of burglary tools.

III. The court properly found, based on this Court's precedent, that Michael Stinson's two prior first degree robbery convictions and one prior first degree burglary conviction were violent felonies and qualified him as an armed career criminal under 18 U.S.C. § 924(e).

IV. The court's 200-month, non-guideline sentence for

Michael, which was ten months below the applicable guideline range, was substantively reasonable and represented a proper balancing of the factors set forth under 18 U.S.C. § 3553(a).

V. Eugene's *pro se* claims are meritless. He waived any alleged due process violation by failing to file a motion to suppress and/or a motion to dismiss or otherwise raising these claims before the district court. He likewise waived any claim that the court improperly admitted predisposition evidence against him. His challenge to the sufficiency of the evidence fails because it ignores both the Government's evidence of his involvement in the theft and the evidence showing that he was not induced to commit the crime and, nevertheless, was predisposed to engage in the conduct. His suggestion that the Government somehow did not fulfill its discovery obligations has no factual or legal support. His attack on the district court's guideline calculation fails because the court's enhancements for role and the number of firearms involved in the offense were legally and factually correct. His argument that the district court should have granted Michael's motion for mistrial based on publicity occurring during the trial ignores the district court's well-stated reasons for denying the motion.

VI. Michael's *pro se* claims are meritless. Michael waived the constitutional and/or jurisdictional challenges he now raises for the first time on appeal because he failed to file a motion to suppress or a motion to dismiss, and did not otherwise make these claims to the district court. As with Eugene's discovery claim, Michael's suggestion that the

Government somehow did not fulfill its discovery obligations has no factual or legal support. In addition, the evidentiary errors he now raises for the first time on appeal have no merit, and his challenges to comments made by the Government in its closing argument fail to establish the impropriety of the comments themselves or how they supposedly deprived him of a fair trial.

Argument

I. The district court did not commit plain error or violate Eugene Stinson's substantial rights in how it handled two evidentiary issues that arose during Michael Stinson's testimony

A. Relevant facts

Shortly before trial, Michael filed a notice of his affirmative defense of derivative or vicarious entrapment, claiming that Stevenson, acting as an agent of the Government, induced Michael to steal the firearms through Eugene. (MA9, MA28; GA9-10). In response, Eugene and Harvin filed motions to sever the trial because Michael's derivative entrapment defense created an antagonistic defense. (EA7). The court then held an evidentiary hearing regarding Michael's entrapment defense, after which it heard argument on the motions to sever. (MA9-10; EA7; GA1-84, 127-40). At the hearing, Michael testified regarding the basis for his derivative entrapment defense. (GA11-50).

In summary, Michael testified that, prior to the night of the theft, Stevenson had advised him that he could take scrap metal from APM and re-sell it and that, on the night of the theft, he went to APM with Harvin for the sole purpose of stealing scrap metal. When Michael arrived at APM, Stevenson told him, for the first time, that there were firearms stored at APM and that he should take them. Michael said that he decided to take the guns instead of the scrap metal because he knew he could make much more

money from selling the guns. (GA15-19, 20, 22, 30-32, 35, 42-45, 63, 67).

Michael also testified about statements that Eugene had made to him.

> Q: So what did Eugene say about these weapons that Ameed could get?
>
> A: Eugene said that Ameed had been asking him to help him get some guns from his place of work.
>
> Q: Did he say who brought this up first, Eugene or Ameed?
>
> A: Ameed brought it up. In fact, he had kept asking him. That's how it came to my attention.
>
> Q: So, when he told you about it, what did he say?
>
> A: He asked me what I thought about it.
>
> Q: What was your reaction?
>
> A: I told him, I said, you know, from what the street is, Ameed been selling these guns, he been doing all right without us, so why all of a sudden out of the blue he want to break us off a piece of the pie? I said it don't sound right.
>
> Q: So, when Eugene heard you hesitate at this opportunity, what did he say in response to you?

A: He told me that he had checked it out, he had talked to Ameed and everything was cool.

Q: So he was reassuring you?

A: Yes, he was.

Q: How many times do you think you talked to Eugene about this opportunity?

A: Probably at a minimum about five.

Q: Beginning in September you said?

A: Exactly.

(GA14-15).

Michael also testified about conversations that he had with Eugene on the night of the theft:

A: Right. Now, I called my son Eugene and I told him I needed to get in contact with Ameed, so he said, "Hold on." He called Ameed. Ameed told him to tell me to come back, the door would be opened, and I went back. . . . So, I left, but by the time I got down the street, Eugene called me back and said that the door was open. So, I went around the block and then I went back.

Q: Okay. Did Eugene say anything else in that conversation?

> A: Yeah, he told me that did I know that there was guns in the place? I said, "No." He said, "Yeah, there is guns in that place." I said, "Okay." But he told me, "Make it your business to check and see what the story is." I said, "Okay, I'll do that."

(GA18-19).

Because there was "no testimony that Eugene asked [Michael] to do anything," (GA50), defense counsel agreed that any entrapment defense would be one of direct, rather than derivative or vicarious, entrapment. (GA51,58). The court specifically ruled that the evidence did not support a claim of vicarious entrapment, but the court permitted Michael to raise a defense of direct entrapment. (GA11-50, 62, 67, 69-71, 76-79).

On March 1, 2010, approximately five days after the hearing on Michael's entrapment defense, Eugene filed a notice of his affirmative defense of entrapment. (EA7). Harvin and Eugene then withdrew their motions to sever because Michael's and Eugene's defenses of direct entrapment no longer presented antagonistic defenses; all parties agreed that a joint trial could proceed. (EA8; MA10; GA67, 69-71, 79, 127-40). Based on the parties agreement that a joint trial was appropriate and would not prejudice any defendant, the district court denied the motions to sever as moot. (EA8; MA10).

At trial, of the three defendants, only Michael testified on his own behalf and, in doing so, set out his defense of direct entrapment. In recounting his version of events,

Michael testified about statements that Eugene had made to him prior to the theft. In pertinent part, the testimony proceeded as follows:

> Q: Did you ever talk to your son Eugene about weapons Ameed could get through APM?
>
> A: I did.
>
> Q: When was that; do you remember?
>
> A: That was on about four or five different occasions, and I think it started about September, somewhere in there.
>
> Q: What did Eugene say to you?
>
> A: Eugene said that Ameed had come to him with a proposition concerning the guns that he could get from his job. I told Eugene that I didn't think that was a good idea.
>
> Q: Did Eugene tell you–who raised the subject first, Ameed or Eugene?
>
> A: He told me that Ameed had come to him.
>
> Q: Okay. And when Eugene first told you about Ameed's opportunity, what was your reaction to it?
>
> A: Excuse me? I didn't understand that. Would

you repeat it, please.

Q: Sure. When Eugene first told you about this opportunity Ameed came to him with –

A: Right.

Q: What was your response to that?

A: My response was that if Ameed has been selling those guns out of his car all the time, why all of a sudden would he come to us for our assistance in getting them. It didn't make sense, there was no logic in it.

Q: So, would you say you hesitated at Eugene's mention of this opportunity?

A: Of course I did. Actually, I was against it.

Q: And what was Eugene's response to your hesitation?

Eugene's Counsel: I'm just going to object to the statements from Eugene to Michael Stinson. They're not part of the conspiracy.

The Court: Sustained.

(GA749-50).

Michael later testified about statements that Eugene

made to him during the theft of guns, and Eugene's counsel again objected, as follows:

> Q: So, Eugene called you back?
>
> A: No, I called Eugene back or I -- actually, I had called Eugene and he told me that Ameed said to come back because he would open the door, and I went back.
>
> Q: Okay, what happened then?
>
> A: The door was still locked.
>
> Q: What happened after the door was locked?
>
> A: So, I left. But by the time I got to the end of the block, Eugene called me and said Ameed said for me to come back because the door was opened.
>
> Q: Okay.
>
> A: So, evidently he had seen me or heard me or something and just told Eugene to tell me to come back, because I went back. That was the third time I was there.
>
> Q: Okay.
>
> A: I went back, the door was still locked.

> Q: During the conversation with Eugene, was anything else said?
>
> A: Yes, Eugene asked me if I knew that they had guns in there.
>
> Eugene's Counsel: I'm going to object, your Honor, ask that that be stricken, the statements of Eugene.
>
> Michael's Counsel: Your Honor, I'm offering the statements of a co-conspirator.
>
> Eugene's Counsel: I don't know if they can be offered by the defense in furtherance of a conspiracy, anyway. I think that's a --
>
> The Court: May I see counsel at sidebar.

(GA754-55).

At sidebar, the parties argued the admissibility of the statement as a statement of a co-conspirator in furtherance of the conspiracy. (GA755-57). The court stated that "there had been an agreement in the beginning of this trial that all three defendants could be tried together because none of them had any antagonistic defenses," (GA758), and indicated that it should sustain the objection on that basis. (GA761). After hearing additional argument, the court asked Michael's counsel if was possible to "proceed with your evidence of direct entrapment, not your evidence

of vicarious entrapment," and then "sort out this question" at a break. (GA762). The parties agreed. (GA762). At break, the court asked, "[D]o we want to return to the issue of Michael Stinson's claim to offer statements made by Eugene Stinson for the truth of their substance as a statement of a co-conspirator?" (GA811). Michael's counsel asked to address the issue after the lunch break. (GA811). At that point, the court raised the question, as follows:

> The Court: Ms. Gagne [Michael's counsel], anything further on your efforts to introduce a statement of a co-conspirator?
>
> Michael's Counsel: No, your Honor, I will not be going back to that.
>
> The Court: Pardon me?
>
> Michael's Counsel: No, your Honor, I will not be going back to that.
>
> The Court: Is there anything, Mr. Golger [Eugene's counsel], that you want me to do with respect to what was asked or otherwise?
>
> Eugene's Counsel: I would just ask the Court to give a limiting instruction, you know, perhaps reiterating the fact that the–do you know what, I'm not going to ask for an additional statement. I don't want to draw anymore attention to it on that.

(GA821-22). The court did not thereafter rule on the objection in front of the jury, strike the testimony or give the jury a limiting instruction.

At the close of evidence, the court decided that Michael had not presented sufficient evidence to justify a jury instruction on the affirmative defense of derivative entrapment claim, but decided that, although there was no evidence of Government inducement of Michael, it would instruct the jury on the defense of direct entrapment as to both Michael and Eugene. (GA856-57, GA875-78).

B. Governing law and standard of review

As a general rule, "[a]ll relevant evidence is admissible." *United States v. Stewart*, 590 F.3d 93, 133 (2d Cir. 2009) (quoting Fed. R. Evid. 402). Under Rule 403, relevant evidence "may be excluded by the district court 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Id*. (quoting Fed. R. Evid. 403). "A district court is obviously in the best position to do the balancing mandated by Rule 403." *United States v. Salameh,* 152 F.3d 88, 110 (2d Cir. 1998). "We will second-guess a district court only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *Id.* (internal quotation marks omitted).

Where, as here, a defendant does not object to the alleged evidentiary errors he raises on appeal, this Court

reviews for plain error. *United States v. Jakobetz*, 955 F.2d 786, 801-802 (2d Cir. 1992). Under plain error review, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

A defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (internal quotation marks omitted). "The law is well established that if, 'as a tactical matter,' a party raises no objection to a purported error,

such inaction 'constitutes a true "waiver" which will negate even plain error review.'" *Quinones*, 511 F.3d at 321 (quoting *Yu-Leung*, 51 F.3d at 1122) (footnote omitted).

C. Discussion

Eugene claims that he was denied a fair trial because of the manner in which the district court handled two discrete evidentiary issues that arose during Michael's testimony. He refers, generally, to the potential prejudice that can arise in joint trials and claims that the district court here should have done more to ensure Eugene a fair trial. *See* Eugene's Brief at 12, 13, 16. It bears note at the outset that Eugene does not argue that the court erred in proceeding with a joint trial and could not make that argument because he has waived it. He withdrew his motion to sever prior to trial, explicitly agreed to a joint trial, and never again moved for severance. *See United States v. Green*, 561 F.2d 423, 426 (2d Cir. 1977) (holding that failure to move to sever under Rule 14 before trial constitutes waiver under Fed. R. Crim. P. 12(b)(3)(D)); *see also Olano*, 507 U.S. at 733 ("[W]aiver is the intentional relinquishment or abandonment of a known right.") (internal quotation marks omitted).

Eugene claims that, during the trial, the district court "repeatedly" permitted the jury to consider, "on an unlimited basis," prejudicial evidence and "thereby guaranteed that Eugene Stinson would be denied a fair trial." Eugene's Brief at 17-18. In support of this broad attack, Eugene points to only two instances where the

court purportedly allowed "inadmissable and irrelevant but highly prejudicial testimony by Michael Stinson." *Id.* at 17, 18.

First, Eugene challenges the court's handling of the objection that he raised at the conclusion of several questions asking Michael about a conversation he had with Eugene prior to the APM theft. *See* Eugene's Brief at 18. As discussed above, Michael had testified, without objection, that Eugene had approached him and told him that Stevenson had access to firearms through his job and wanted to get Eugene involved in an opportunity to steal some of those firearms. (GA749-50). It was not until Michael had testified that he had been hesitant to get involved with Stevenson, and Michael's counsel had asked him what Eugene's response to that hesitation had been that Eugene's counsel objected. (GA749-50).

Eugene now asserts that, although the court sustained this objection, it should have done more; it should have stricken the testimony and "instruct[ed] the jury as to the scope of the testimony that it was not to consider." Eugene's Brief at 18. Of course, Eugene's counsel never asked for any testimony to be stricken or for any limiting instruction. Moreover, because the court sustained the objection before Michael could answer the question, there was no evidence to strike and no issue to discuss in a limiting instruction. Therefore, the court did not err, much less plainly err, in the way in which it handled this first evidentiary issue.

To the extent that Eugene is now claiming that the

court should have *sua sponte* stricken the entire line of questioning about Stevenson's statements to him, his claim fails. He never objected to this testimony, let alone asked for it to be stricken. Moreover, in light of the fact that Eugene himself, who was not testifying, was raising a direct entrapment defense, any evidence of Government inducement was helpful to his case. Stevenson's alleged statements to Eugene, as discussed by Michael, if credited by the jury, could have served as evidence of Government inducement and thereby satisfied that element of entrapment.

Second, Eugene challenges the district court's handling of his objection to Michael's testimony that, on the night of the theft, Eugene had told him that there were guns inside the APM warehouse. He claims that this singular statement by Michael was so prejudicial that it denied a fair trial and "that the verdict against him be set aside." Eugene's Brief at 19. More specifically, he maintains that the court determined at sidebar that the objection should be sustained, but "that ruling was never communicated to the jury." Eugene's Brief at 19. Thus, he claims "the jury was permitted to give full and unfettered consideration to Michael Stinson's unquestionably improper testimony." *Id.* at 19.

This argument misstates the record. The court did not sustain Eugene's objection at sidebar. Instead, it pressed Michael's counsel to explain the evidentiary basis for the statement, and, after much discussion, Michael's counsel decided to abandon the question, not to claim the answer to the question and not to pursue any other questions along

this same line. At that point, the district court specifically asked Eugene whether it should strike Michael's answer to the challenged question and instruct the jury to disregard it, and Eugene told the court not to strike the answer or issue a limiting instruction because he did not want to draw any more attention to the testimony. (GA821-22). By taking this position, Eugene has explicitly waived any claim on appeal that the district court should have stricken the testimony and issued a curative instruction. *See Olano*, 507 U.S. at 733.

Even if Eugene had not waived the claim, however, it is certainly not clear why this statement was objectionable. The challenged testimony itself was relevant to the charge of conspiracy to steal firearms from APM and would have been admissible as a co-conspirator's statement in furtherance of the conspiracy. *See, e.g., United States v. Simmons,* 923 F.2d 934, 945 (2d Cir. 1991) ("[A] statement is made in furtherance of the conspiracy if it provide[s] reassurance, [or] serve[s] to maintain trust and cohesiveness among [the conspirators], . . . [or] inform[s] [other conspirators] of the current status of the conspiracy," as well as "statements designed to induce a listener's assistance. . . .") (internal citations and quotation marks omitted; brackets in original).

Moreover, although Eugene characterizes the testimony as highly prejudicial, he fails to explain why it was so prejudicial. In fact, Eugene's defense of direct entrapment relied on evidence that, prior to the night of the theft, Stevenson had induced him into participating in the crime by telling him that there were firearms at APM that would be easy to steal. Michael's testimony that, on the night of

the theft, Eugene had advised him that there were guns inside APM was certainly consistent with this defense. Indeed, it is difficult to conceive of how Eugene could have been entrapped into committing this crime without having known that there were firearms stored inside APM prior to the night of the theft and without having communicated this fact to Michael.

As to both evidentiary claims now raised on appeal, Eugene has failed to show how the district court erred, much less plainly erred, in its handling of his objections. It sustained the first objection and, in response to the second objection, offered to strike the testimony and provide a limiting instruction. The record establishes that the court made a conscientious assessment of the evidence to minimize its prejudicial effect and to ensure that Eugene received a fair trial. *See Salameh*, 152 F.3d at 111 ("To avoid acting arbitrarily, the district court must make a 'conscientious assessment' of whether unfair prejudice substantially outweighs probative value").[5]

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[5] Since before the trial began, the court was vigilant about protecting the rights of the defendants with respect to the various defenses asserted at various times in this case. The court heard lengthy argument on the motions for severance arising from Michael's assertion of the derivative entrapment defense, held an evidentiary hearing as to Michael's entrapment defense and did not proceed with a joint trial until the parties had agreed that Michael would not raise a derivative entrapment claim and that the direct entrapment claims would not be antagonistic.

(continued...)

Eugene has also failed to prove that any alleged error affected the outcome of the trial. The trial evidence against Eugene was substantial and included Stevenson's testimony that Eugene was involved in the initial theft of guns from APM in August and that Eugene arranged the October theft of guns from APM, (GA394-578), recordings of calls and conversations between Eugene and Stevenson regarding Eugene's involvement in organizing the October theft, (Exs.A-G), a stipulation that it was Eugene's voice on the recordings, (Ex.2K), ATF agents' testimony that the Eugene's red Dodge Charger was at APM the day before the theft and was in the vicinity of APM on the night of the theft, (GA219, 220, 230, 472-73, 604-05, 716), evidence that, after Harvin and Michael went to the wrong door at APM, Stevenson told Eugene which door to enter, and Eugene passed that information on to Michael and Harvin, (GA231-32, 487, 490-92, 605-614, 720-24; Ex.4G), toll records which showed calls between Eugene's and Michael's phones before and during the theft, (GA682-86), and the video of the theft itself, (Ex.1-J).

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[5] (...continued)
(GA67, 69, 71-79).

II. The evidence offered at trial was sufficient to establish Michael's guilt and to rebut his claim of direct entrapment.

A. Relevant facts

At trial, Michael testified in support of his direct entrapment defense that Stevenson, acting as a Government agent, induced him to steal the firearms from APM by luring him to APM under the pretense of giving him access to scrap metal to steal, and then directing him instead to steal the firearms. Michael's testified that he had initially contacted Stevenson in September 2009 to ask him about the availability of scrap metal at APM. (GA749-50, 772). Michael then contacted Stevenson a second time, and Stevenson told him to come to APM any time to retrieve the scrap metal. (GA751-52). Michael did not discuss with Stevenson a particular day or time or meeting location, but showed up unannounced at 2 a.m. on October 21, 2009, at APM's back loading dock, where he tried one of three possible doors and found it to be locked. (GA751-53, 773-75, 778-780). This was the same door Stevenson had originally told Eugene would be open. (GA222, 223, 476, 480; Ex.4D). Michael testified, as follows:

> A: The door was locked. I called my son and I told him, I said, "I need to get in contact with Ameed." . . . Eugene said, "Hold on." . . . Eugene called me back and told me Ameed said the door would be opened. So, I went back to American Precision to check to see if the door was opened, and it was not.

Q: Okay, what happened then?

A: The door was still locked.

Q: What happened after the door was locked?

A: So, I left. But by the time I got to the end of the block, Eugene called me and said Ameed said for me to come back because the door was opened.

(GA752-54).

Michael further testified that he went to APM to get scrap metal, (GA749, 777, 793-94) and that, after he entered APM, he headed to the back of the assembly room toward some scrap metal in containers. (GA794). The video recording of the incident, along with the testimony of Stevenson and the owner of APM, showed that, once inside APM, Michael walked directly toward a locked door where hundreds of guns were stored and where the firearms stolen in August had been kept. (GA327, 331, 407-08). There was no scrap metal in the assembly room. (GA413, 552-53, 794; Ex. 1-J).

Michael testified that, once he was inside APM, Stevenson came over to him, and they spoke, as follows:

A: Ameed then came over to me and said, "No, not over there, over here. Come over here. The guns are over here." I looked at him, he said, "Take these guns over here." So, I thought for a second, and I told Mr. Harvin, I said, "Come here." And he came

> over to me and he said "What?" I said "Hold this bag," and I started putting the guns in the bag. . . . I went there trying to get one thing and I wound up getting another thing. It was kind of like I had to make a split decision, you know, and it was based on Ameed's suggestion. . . . I didn't really want to do that . . . But to make a profit, yes, I considered it and yes, I did take it."

(GA764, 768, 840).

On cross examination, Michael attempted to clarify his intent on the night of the theft.

> Q: So, when you first went to APM, your intent was to take scrap metal, right?
>
> A: It was.
>
> Q: And then you are saying Ameed Stevenson told you to take the guns instead?
>
> A: He did.
>
> Q: So, you changed your mind?
>
> A: I did.
>
> Q: In an instant?
>
> A: Pretty much.

Q: I mean, before you just said it was a split second decision?

A: Yes, it was.

(GA794).

Michael testified that he knew the street value of guns, (GA795), that they were worth much more than scrap metal, (GA794-95), and that once he saw the guns, "then the numbers started registering automatically." (GA841). He explained, "It was reflexive, you know. It wasn't like I did a lot of this. It was more of a reflex. You know, I was going to get a great deal more money for the guns that I was the scrap, so I took them." (GA841). Michael also testified that he intended to resell the guns on the street and that he would not have given Stevenson or Eugene any of the money because it was "not part of the deal." (GA795, 840-41).

During his testimony, Michael acknowledged that he had a felony conviction for possession of narcotics, a federal conviction for robbery of a postal station with a gun, a felony conviction for first degree burglary, and a felony conviction for possession of burglary tools, and that he knew as a convicted felon he was not allowed to possess guns. (GA800-801). Moreover, Michael admitted that the theft of guns from APM in October was "not the first time that I've gone into a place to steal something." (GA801).

B. Governing law and standard of review

Because a claim that the evidence was insufficient to rebut a defense of entrapment is "in substance an attack on the sufficiency of the government's evidence of predisposition, that evidence must be viewed in the light most favorable to the government, and all reasonable inferences must be drawn in the government's favor." *United States v. Brand*, 467 F.3d 179, 191 (2d Cir. 2006) (citations omitted); *see also United States v. Jackson*, 345 F.3d 59, 66 (2d Cir. 2003) (stating that a court reviews a defendant's claim of entrapment "under the same rigorous standards applicable to other sufficiency claims").

"To make out a defense of entrapment, 'a defendant must first prove government inducement by a preponderance of the evidence. The burden then shifts to the government to show that the defendant was predisposed to commit the crime beyond a reasonable doubt.'" *United States v. Al-Moayad*, 545 F.3d 139, 153 (2d Cir. 2008) (quoting *United States v. Gagliardi,* 506 F.3d 140, 149 (2d Cir. 2007)).

To prove inducement, the defendant must establish that it was the government who "initiated the crime, . . . [o]r, put another way, . . . set the accused in motion." *Brand*, 467 F.3d at 190 (internal citations omitted). "[I]nducement includes 'soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged.'" *Id.* "A defendant's burden of proof on inducement should not be treated as a hollow requirement

in those cases where the government has not conceded the issue." *Brand,* 467 F.3d at 190. Moreover,

> to satisfy the burden on inducement, a defendant cannot simply point to the government's use of an undercover agent or confidential informant. While stealth and strategy are necessary weapons in the arsenal of the police officer, and [a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises, that the government employed either does not necessarily mean that it was the government that initiated the crime, or set the accused in motion.

Id. (internal citations and quotation marks omitted); *see also Sherman v. United States*, 356 U.S. 369, 372-373 (1958) ("[T]he fact that government agents merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials"); *Sorrells v. United States*, 287 U.S. 435, 441-442 (1932) ("It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution").

"A defendant is predisposed to commit a crime if he is 'ready and willing without persuasion to commit the crime charged and awaiting any propitious opportunity' to do so." *Al-Moayad,* 545 F.3d at 154 (*quoting United States v. Salerno,* 66 F.3d 544, 547 (2d Cir. 1995), *quoting United*

States v. Harvey, 991 F.2d 981, 992 (2d Cir. 1993)).

> The government may show that a defendant was predisposed to commit the crime charged by demonstrating (1) an existing course of criminal conduct similar to the crime for which he is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement.

Al–Moayad, 545 F.3d at 154. Predisposition does not "require specific prior contemplation of criminal conduct" by the defendant; it is "sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion." *United States v. Williams,* 705 F.2d 603, 618 (2d Cir. 1983).

C. Discussion

Michael, whose direct entrapment defense was presented to and rejected by the jury, now claims that he was entrapped as a matter of law. *See* Michael's Brief at 32. In support of his position, Michael relies on his testimony at trial that he had spoken to Stevenson about getting scrap metal from APM twice in the fall of 2009, (GA749-50, 772), that he went to APM in the middle of the night on October 21, unbeknownst to Stevenson, to get that scrap metal, (GA749, 777, 793-94), and that the only

reason he stole the firearms was because Stevenson came over to him and said, "Take these guns over here." (GA764). According to Michael, in that split second, he decided to take the firearms because he knew he could make much more money from selling them than from selling scrap metal. (GA768, 795, 840-41).

Stevenson's testimony directly contradicted Michael's testimony. Stevenson testified that he never had a conversation with Michael about scrap metal. (GA551). He also testified that he had arranged the theft of firearms with Eugene, not Michael, (GA456-85), and that, other than when he had delivered two stolen APM guns to Michael at Eugene's request in September 2009, he had no contact with Michael before the October theft from APM. (GA441-42, 495). Stevenson said he was "shocked" to see Michael at APM on the morning of the theft because "that's Eugene's father. I didn't know he was going to be popping up at that door like that." (GA494-95).

In addition, the toll records confirmed that there were no calls between Stevenson and Michael during this time period. (GA686-87). Even Michael admitted during his testimony that he had never called Stevenson and did not even have his phone number. (GA774). Indeed, in an attempt to explain the recorded calls from Eugene to Stevenson on the night of the theft, Michael testified that, when he found that the door to APM was locked, rather than call Stevenson – the person with whom he claimed he had arranged to take scrap metal, was meeting him at APM and was like family to him–he instead called Eugene twice and asked him to contact Stevenson about the locked door.

(GA752-53, 754).

The only evidence to support Michael's entrapment defense was his own testimony, and the jury was free to reject that testimony and credit Stevenson's testimony that he and Michael had never discussed obtaining scrap metal from APM. *See United States v. Mayo*, 705 F.2d 62, 68 (2d Cir. 1983) ("understanding that resolution of an issue of credibility as between the agent and the defendant . . . is peculiarly within the jury's province"). The evidence, viewed in the light most favorable to the Government, demonstrated that Stevenson did not induce Michael by luring him to APM on the pretext of obtaining scrap metal, but rather that Michael went to APM because Eugene had sent him there to steal firearms.

Even if Michael's testimony is credited, however, it is insufficient to carry his burden to show that he was induced. First, according to Michael, he was the one who contacted Stevenson twice to inquire about scrap metal and who showed up to APM unannounced on the night of the theft. Second, Michael made the decision to take the guns, which he characterized as a "split second decision," not because Stevenson induced him, but because he himself knew how much more valuable firearms would be for re-sale. (GA764, 768, 794, 841). This testimony, therefore, was not sufficient to show as matter of law that Stevenson induced, persuaded or coerced Michael to commit the crime. *See, e.g.*, *United States v. Thompson*, 130 F.3d 676, 690-691 (5th Cir. 1997) ("The government's presentation of an opportunity for a defendant to commit a crime, without more, is not

inducement") (citing *Jacobson v. United States,* 503 U.S. 540, 550 (1992)); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) ("Inducement has been defined as 'repeated and persistent solicitation' or 'persuasion' which overcomes the defendant's reluctance") (quoting *United States v. Reynoso–Uloa,* 548 F.2d 1329, 1335–36 (9th Cir.1977) (quoting *Sorrells v. United States,* 287 U.S. 435, 441 (1932))); *United States v. Barry*, 814 F.2d 1400, 1402 n.2 (9th Cir. 1987) ("Merely offering the opportunity to commit a crime is not conduct amounting to inducement"); *United States v Andrew*s, 765 F.2d 1491, 1499 (11th Cir. 1985) ("evidence that the government agent sought out or initiated contact with the defendant, or was the first to propose the illicit transaction, has been held to be insufficient to meet the defendant's burden. The defendant must demonstrate not merely inducement or suggestion on the part of the government but an element of persuasion or mild coercion") (internal citations omitted) (citing cases).

Even assuming *arguendo* that Michael established inducement by a preponderance of the evidence, Michael's response to the inducement showed that he was predisposed (i.e., he was ready and willing without persuasion) to commit the crime. Michael testified that it took a split second after Stevenson said, "Take the guns" for him to decide to switch gears and steal the firearms; he did not hesitate. *See, e.g., United States v. Williams,* 705 F.2d 603, 618 (2d Cir. 1983) (proof of predisposition is "sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own

preference and not the product of government persuasion."); *United States v. Anglada,* 524 F.2d 296 (2d Cir. 1975) (propensity was established by the agent's testimony of the defendant's ready and unhesitating response to his inducement). Indeed, Michael testified that he knew the street value of guns, (GA795), that they were worth much more than scrap metal, (GA794-95), and that once he saw the guns, "then the numbers started registering automatically. It was reflexive, you know. It wasn't like I did a lot of this. It was more of a reflex. You know, I was going to get a great deal more money for the guns that I was the scrap, so I took them." (GA841).

Moreover, the evidence of Michael's prior convictions established that he had engaged an existing course of criminal conduct similar to the crime for which he was charged, in that he had "a federal conviction for robbery of a postal station . . . with a gun, . . . a felony conviction for first degree burglary, . . . [and] a conviction for possession of burglary tools." (GA800-801). This evidence also established that, although he knew he was not allowed to possess guns as a prior convicted felon, (GA801), he had possessed the two stolen guns that Stevenson had given to him at Eugene's request in September. (GA442).

Further, Michael admitted that the theft of guns from APM in October was "not the first time that I've gone into a place to steal something." (GA801). *See Mayo*, 705 F.2d at 70 (holding government established predisposition beyond a reasonable doubt because of defendant's "ready and unhesitating response" to the inducement and his "unhesitating willingness to commit the crimes for which

he was convicted"). In *Mayo*, the defendant had been convicted previously of firearms violations, had previously unlawfully possessed guns, and had "jumped at the opportunity" to sell guns to an undercover agent. *Id.* The Court noted, "[T]his is not a case where the Government's deception actually implanted the criminal design in the mind of the defendant." *Id.*

Thus, the jury properly concluded that Michael was not entrapped by the Government to commit the charged offenses.

III. The court properly determined that Michael was an armed career criminal because his prior convictions for robbery and burglary were crimes of violence under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4.

A. Relevant facts

The Pre-Sentence Report ("PSR") found that the offense level, under U.S.S.G. § 4B1.4(b)(3)(b), was 33 because Michael had at least three felony convictions for a crime of violence or a controlled substance offense. *See* PSR ¶ 28. According to the PSR, "the defendant has sustained felony convictions for Possession of Narcotics, July 31, 2006; Felony Escape, July 19, 1985; Robbery First Degree, December 11, 1984; Burglary First Degree, July 19, 1985; and Robbery of a Postal Facility, in violation of 18 U.S.C. § 2114, on October 21, 1994." *Id*.

On May 28, 2010, the court conducted a sentencing

hearing, (GA1076-1146), during which it determined that Michael was an armed career criminal because he had at least three prior convictions that qualified as crimes of violence under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4. (GA1104). The parties and the court agreed that the prior conviction for Robbery of a United States Postal Station, in violation of 18 U.S.C. § 2114, qualified as a crime of violence. (GA1096-97). The parties disagreed, however, as to whether Michael's two convictions for First Degree Robbery, in violation of Conn. Gen. Stat. § 53a-134(a)(4), and one conviction for First Degree Burglary, in violation of Conn. Gen. Stat. § 53a-101, categorically qualified as crimes of violence under § 924(e). After considering the parties' briefs on the issue, (GA1041-1175), and hearing argument, (GA1096-1105), the court found that the two state robbery convictions categorically qualified as crimes of violence under § 924(e), (GA1100), stating that the Second Circuit law regarding the categorical approach "makes pretty clear to me by the language that the elements in the state statute matches the 924 requirements." *Id.*

Although it was unnecessary to the ultimate issue because the court had already concluded that the defendant had the requisite number of convictions and was an armed career criminal, the court also found that Michael's burglary conviction categorically qualified as a crime of violence. (GA1104). In support, the court cited to *United States v. Brown*, 514 F.3d 256 (2d Cir. 2008), which held that under "the identically worded residual clauses" of § 924(e) and U.S.S.G. § 4B1.2(a)(2), "the crime of burglary constitutes a 'crime of violence' even where the burglary

did not involve a dwelling." (GA1101-02). Accordingly, the court determined that Michael was an armed career criminal. (GA1104).

B. Governing law and standard of review

To determine whether a defendant is an armed career criminal, the court must find that at least three prior convictions qualify as violent felonies or crimes of violence under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4. *See Sykes v. United States*, 131 S. Ct. 2267, 2270 (2011); *United States v. Brown*, 52 F.3d 415, 425 (2d Cir. 1995) ("violent felony" under 18 U.S.C. § 924(e)(2)(B)(I) uses the same definition as the definition for "crime of violence" under § 4B1.2). Under 18 U.S.C. § 924(e)(2)(B), the term violent felony applies to conduct committed by adults and juveniles.

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that–
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that

> presents a serious potential risk of physical injury to another; and
>
> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e); *see also Sykes*, 131 S. Ct. at 2272-2273.

To determine whether a prior conviction is a crime of violence under 18 U.S.C. § 924(e), courts employ the categorical approach. "Under this approach, we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction." *Sykes*, 131 S. Ct. at 2272 (*quoting James v. United States*, 550 U.S. 192, 202 (2007)); *see also Taylor v. United States*, 495 U.S. 575, 600-601 (1990).

Under § 924(e)(2)(B)(ii), when determining whether a prior conviction qualifies as a crime of violence, courts consider whether the crimes are one of the enumerated crimes expressly listed or "whether the elements of the offense are of the type that would justify its inclusion within the residual provision [i.e., conduct that presents a serious potential risk of physical injury to another], without inquiring into the specific conduct of this particular offender." *James*, 550 U.S. at 202 (brackets added). "The matter of whether a crime other than one specifically identified as a violent felony in § 924(e)(2)(B)(ii) 'involves conduct that presents a serious potential risk of physical

injury to another' is a question to be answered by reference to the general definition of the crime of which the defendant was convicted." *United States v. Andrello,* 9 F.3d 247, 249-250 (2d Cir. 1993) (quoting *Taylor*, 495 U.S. at 602).

The crime of First Degree Robbery in violation of Conn. Gen. Stat. § 53a-134(a)(4), which refers to, and includes, the predicate crime of Robbery, under Conn. Gen. Stat. § 53a-133, is a class B felony and has as an element the use, attempted use, or threatened use of physical force against the person of another. *See* Conn. Gen. Stat. § 53a-133 ("A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of . . .").

This Court has held unequivocally that the crime of robbery is a crime of violence under 18 U.S.C. § 924(e)(2)(B)(i). *See United States v. Brown*, 52 F.3d 415, 425 (2d Cir. 1995); *see also United States v. Houman*, 234 F.3d 825 (2d Cir. 2000) (holding that robbery is a crime of violence under § 4B1.2); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (same); *United States v. White*, 571 F.3d 365, 370-373 (4th Cir. 2009) (holding that robbery is a violent felony under § 924(e)), *cert. denied*, 130 S. Ct. 1140 (2010)*; United States. v. Brown*, 437 F.3d 450, 452 (5th Cir. 2006) (same); *United States v. Melton*, 344 F.3d 1021, 1025-26 (9th Cir. 2003) (same); and *United States v. Presley*, 52 F.3d 64, 69 (4th Cir. 1995) (same).

The Connecticut statute for first degree burglary provides:

> (a) A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument, or (2) such person enters or remains unlawfully in a building with intent to commit a crime therein and, in the course of committing the offense, intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone, or (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.

Conn. Gen. Stat. § 53a-101.

The Supreme Court established that "[a] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990); *see also United States v. Andrello*, 9 F.3d 247, 249-250 (2d Cir. 1993). This Court in *James* extended that ruling to apply to U.S.S.G. § 4B1.2's definition of a crime of violence, holding that, under the residual clause of § 924(e)(2)(B)(ii), burglary of a building, rather than a dwelling, was a crime of violence under U.S.S.G. § 4B1.2. 52 F.3d at 425.

C. Discussion

Michael claims that, although his federal conviction for first degree robbery qualifies as a crime of violence under § 924(e), neither his two state first degree robbery convictions, nor his first degree burglary conviction qualify. Thus, he claims that he does not have the requisite three qualifying crimes of violence under sections 924(e) and 4B1.4 and is not an armed career criminal. *See* Michael's Brief at 18-26.

1. The robbery convictions qualify

Michael does not dispute that, to qualify as a violent felony under section 924(e), a prior conviction must have as an element the use, attempted use, or threatened use of physical force against the person of another. *See* Michael's Brief at 23-24. Further, he concedes that Connecticut's first degree robbery statute contains that element. *Id.* Michael argues, however, that a qualifying prior conviction must also involve "the use or carrying of a firearm," which Connecticut's first degree robbery statute does not require. *Id.* Michael cites to 18 U.S.C. § 924(e)(2)(B) to support his contention. *Id*. at 24.

Simply put, Michael misconstrues the law. There is no additional requirement that an adult conviction for a crime of violence must involve the use or carrying of a firearm. *See* 18 U.S.C. § 924(e)(2)(B). The language Michael refers to is contained in the clause in § 924(e)(2)(B) regarding juvenile acts. Specifically, the statute also defines as a violent felony "any act of juvenile delinquency

involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult." Michael, however, was twenty-two years old at the time of the conduct underlying the earliest robbery conviction, and he sustained both robbery convictions as an adult, so the "juvenile delinquency" language of § 924(e)(2)(B) does not apply to him. *See* PSR ¶ 40. His argument, therefore, fails, and the court properly designated him as an armed career criminal based on this three prior felony robbery convictions.

2. The burglary conviction qualifies

Although it is not necessary to reach this issue because only three prior convictions for violent felonies are necessary to qualify a defendant as an armed career criminal, Michael also challenges the court's finding that his prior first degree burglary conviction qualified as a violent felony under § 924(e). In 1990, the Supreme Court held that "[a] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599 (1990) (reasoning "[w]e believe that Congress meant by 'burglary' the generic sense . . . [and a]lthough the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime").

Connecticut's first degree burglary statute has, as one of the elements for each subsection, that "such person enters or remains unlawfully in a building [or dwelling] with intent to commit a crime therein" and thus categorically qualifies as a violent felony under the residual clause of 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.2. *See, e.g, United States. v. Brown*, 514 F.3d 256, 264-265 (2d Cir. 2008) (holding that third-degree burglary of structure qualifies); *James v. United States*, 550 U.S. 192, 201-202 (2007) (holding that attempted burglary of structure qualifies); *Andrello*, 9 F.3d at 249-250 (holding that burglary of a building qualifies).

Michael claims that this burglary conviction is not categorically a violent felony because it contains a reckless element under subsection (2) of the statute, which sets forth a separate crime for a person who "enters or remains unlawfully in a building with intent to commit a crime therein and, in the course of committing the offense, intentionally, knowingly or *recklessly* inflicts or attempts to inflict bodily injury on anyone." Michael's Brief at 20-21 (emphasis added). The reckless language at issue here, however, is included as an additional aggravating factor over and above the elements for generic burglary contained in the statute. The Supreme Court has addressed this exact situation where, as here, the "state statute is narrower than the generic view, *e.g.,* in cases of burglary convictions in common-law States or convictions of first-degree or aggravated burglary." *Taylor*, 495 U.S. at 599. In that case, because the statute is narrower, it qualifies as a crime of violence – "there is no problem, because the conviction necessarily implies that the defendant has been found

guilty of all the elements of generic burglary." *Id*. Thus, despite the reckless language in one subsection of Connecticut's first degree (or aggravated) burglary statute, it contains the necessary elements of generic burglary and, under Supreme Court and Second Circuit precedent, qualifies categorically as a violent felony.

IV. The court's 200-month sentence, which was ten months below the bottom of the applicable Guidelines range, was substantively reasonable.

Michael claims that his incarceration term of 200 months was substantively unreasonable for two reasons. First, he argues that he "should have received a more lenient sentence because he suffers from several severe medical conditions." Michael's Brief at 36. Next, he claims that, because of his age of 53, the "district court should have granted a lesser sentence based on his lower risk of recidivism." *Id.* at 39-40.

A. Relevant facts

1. The Presentence Report

The Pre-Sentence Report ("PSR"), as set forth above, found that the offense level, under U.S.S.G. § 4B1.4(b)(3)(b), was 33 because Michael had at least three felony convictions for a crime of violence or a controlled substance offense. *See* PSR ¶ 28.

The PSR provided no adjustment for acceptance of responsibility. *See* PSR ¶ 29. Finally, the PSR concluded

that Michael had accumulated thirteen criminal history points, and fell within Criminal History Category VI. *See* PSR ¶ 49; U.S.S.G. § 4B1.4(c)(1). As a result, according to the PSR, Michael faced a guideline range of 235-293 months' incarceration, with a statutory mandatory minimum of 180 months under 18 U.S.C. 924(e). *See* PSR ¶¶ 81, 82.

The PSR also set forth details of Michael's criminal history, which showed sixteen prior felony convictions, including five robberies (two of which involved his use of a gun and one of which was a federal conviction for armed robbery of a post office), several assaults and burglaries, and one possession of a sawed-off shotgun, and the receipt of disciplinary tickets while incarcerated, the escape from custody, and the violation of state probation twice and federal supervised release once. *See* PSR ¶¶ 31-49. According to the PSR, prior to the instant crime, Michael was released from jail on November 26, 2008. *See* PSR ¶ 49.

The PSR stated that "there do not appear to be any factors that would warrant a departure or variance." PSR ¶ 92. Moreover, the PSR advised that "the Court may want to consider the defendant's lengthy criminal history, including a prior federal conviction, when fashioning a sentence, as the score-able history may not accurately reflect the defendant's criminal lifestyle." *Id*.

In addition, the PSR detailed Michael's medical history, including that the medical records showed signs of asthma, hypertension, hepatitis-C, pulmonary fibrosis,

weak urine flow, and back problems, and that his current prescriptions include Advair200/50, Albuteral, Lisinopril 10 mg., Novasac 5 mg., Percoset, Benadryl, Teracosin, HCTZ, Tylenol 650 mg. *See* PSR ¶ 65.

2. The sentencing

On May 28, 2010, the court conducted a sentencing hearing. (GA1076-1146). First, the court heard argument regarding the appropriate Guidelines range. (GA1094-1112). As set forth above, the court determined that Michael was an armed career criminal because he had sustained at least three prior convictions for violent felonies under 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4. (GA1104).

The court declined, however, to add two points to Michael's criminal history score for recency under U.S.S.G. § 4A1.1because the Sentencing Commission had voted to delete that section from the guidelines since "there isn't a demonstrable relationship between recidivism and re-offending within two years." (GA1104-07). Without those two extra points, Michael's criminal history category reduced from a category VI to a category V. (GA1107-08).

Further, the court declined to award any reduction for acceptance of responsibility. (GA1139). In response to Michael's suggestion that he had accepted responsibility for his offense, the court stated, "[T]o say he has accepted responsibility makes a bit of mockery of the term." (GA1133).

Thus, the court found that the base offense level was 33, based on its conclusion that the defendant qualified as an armed career criminal pursuant to U.S.S.G. § 4B1.2; (GA1104) and received no reduction for acceptance of responsibility, (GA1139). The court calculated a criminal history category of V, (GA1107-08), resulting in a guideline incarceration range of 210-262 months, (GA1107-1112). The court also noted "there is a mandatory minimum of fifteen years." (GA1118).

Thereafter, the parties argued about the appropriate sentence. (GA1112-34). Michael's lawyer first argued for a sentence of 210 months – the bottom of the range – based on his low risk of recidivism, his age and the claim that his past crimes were remote, (GA1113-1116). Michael's lawyer then made an oral motion, and argued, for a downward departure from the bottom of the guideline range based on his various medical conditions. (GA1117-18).

Earlier, the court had read into the record Michael's medical conditions which were set forth in the PSR, (GA1079-80), and provided Michael with the opportunity to itemize his medical problems on the record. (GA1079). The only condition that he mentioned which was not listed in the PSR was a possible diagnosis of diabetes. (GA1080). Michael was given the opportunity to discuss his medical condition at length. (GA1137-38).

In making its sentencing decision, the court considered the section 3553(a) factors, and the goals of sentencing. (GA1139-45). The court stated, among other things:

> I do not consider conduct that has the potential to unleash 29 assault weapons in Bridgeport to be anything less than very serious, and they are not going to be going into the hands of people who intend their lawful use or who can lawfully possess them. They are not permitted, that is they're no permits for them, and they would be used for unlawful activities. And the problem is not only does it assist in unlawful activities, but where there is gunfire there is the potential for innocent people to be badly hurt or killed, and there is just too much of that. It breaks your heart every day. . . And that why it's a really serious crime, and that's why it gets a really serious punishment.

(GA1139-40). The court continued.

> And you know that you're facing a very long sentence. But you've also, I think I've totaled this up correctly, spent 350 months behind bars already, 222 in state custody and 128 in federal custody. The appearance to me is that you are unable to live lawfully, and that of course triggers the purpose of a sentence to promote respect for the law as well as provide deterrence for criminal conduct. But I think the government's right, the most important goal in this case is protecting the public.
>
> Your criminal history, and the violence involved in it, is a disregard for the gravity of offenses, the seriousness of offenses. The fact that they involve potentially injury to other people is a disrespect for

> people, which doesn't square with the fact that you have been in a committed relationship for three decades, you have children and a grandchild.

(GA1140-41).

The court also addressed his medical concerns. "I take into account the fact that you have serious medical conditions, and we've gotten those records from Wyatt." (GA1141). The court went on, "I don't mean by any stretch to have you think that I don't consider your offense serious, your record serious, your testimony before the Court to have been forthcoming. I do not think you respect the law or have respect for the requirements as they apply to you, but I do think you are a sick man." (GA1142).

The court sentenced the defendant to a non-Guidelines term of imprisonment of 200 months, (GA1142), and of supervised release of 3 years, and imposed a special assessment of $300.00. (GA1143). The court stated, "This is below the sentencing guideline and is done to reflect your medical condition." (GA1142).

B. Governing law and standard of review

"We review sentences for abuse of discretion, a standard that 'incorporates *de novo* review of questions of law (including interpretation of the [Sentencing] Guidelines) and clear-error review of questions of fact.'" *United States v. Bonilla*, 618 F.3d 102, 108 (2d Cir. 2010) (quoting *United States v. Legros*, 529 F.3d 470, 474 (2d Cir. 2008)). "In applying this standard to sentencing appeals, we are constrained to review for reasonableness." *Id.* (citing *Gall v. United States*, 552 U.S. 38, 46 (2007)). This appellate scrutiny "encompasses two components: procedural review and substantive review." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc).

The substantive inquiry "assesses 'the length of the sentence imposed in light of the [§ 3553(a)] factors.'" *United States. v. Verkhoglyad*, 516 F.3d 122, 127 (2d Cir. 2008) (quoting *United States v. Villafuerte*, 502 F.3d 204, 206 (2d Cir. 2007)). In so doing, we must "take into account the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantage of district courts." *Cavera*, 550 F.3d at 190. A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of

law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010).

C. Discussion

The defendant's 200-month sentence was reasonable and reflects the factors set forth in § 3553(a). As the court stated, a lengthy sentence was necessary to reflect the seriousness of the offense, to promote respect for the law, to provide deterrence, and to protect the public from further criminal conduct by the defendant. (GA1141). The court specifically indicated that it was concerned about the violent nature of Michael's conduct at issue, (GA1139-40), his violent criminal past which demonstrated to the court a disregard for the seriousness of his crimes, (GA1141), and the length of time Michael had already spent in jail and thought that it showed that Michael was "unable to live lawfully," (GA1141), and that a lengthy sentence was necessary to protect the public. (GA 1141).

As to the seriousness of the offense, the defendant was responsible for attempting to steal twenty-nine assault rifles from a federally licensed firearms dealer. (GA232, 490-92, 722-26; Ex.1-J). Moreover, Michael had every intention of reselling those assault rifles on the streets of Bridgeport because they were worth more money than scrap metal, (GA795, 840-41), thus, perpetuating the cycle of violence and danger that accompanies the illegal distribution of firearms and the future use of those assault weapons.

As to the issues of specific deterrence and protection of the community, the court concluded that the defendant posed a serious risk of recidivism based on his criminal history. Michael had amassed at least sixteen prior felony convictions, including five robberies (two which involved his use of a gun), several assaults and burglaries, possession of narcotics, and possession of a sawed off shotgun. PSR ¶¶ 31-49. Moreover, he had received disciplinary tickets while incarcerated, escaped from custody, and violated his probation twice and his federal supervised release once. *Id*.

Indeed, even though many of his prior convictions were too remote to be counted, he still fell within Criminal History Category V under the advisory Guidelines range. (GA1104-07; PSR ¶49). Most of Michael's arrests occurred before 1985, however, because he was incarcerated for the vast majority of the time after 1985. PSR ¶¶ 31-49. Tellingly, within less than one year from his release, Michael was arrested for stealing the twenty-nine assault rifles from APM. PSR ¶48.

Nothing in his past record indicates that Michael will change his ways. His prior convictions which involve illegal possession of guns did nothing to convince him to refrain from stealing twenty-nine assault rifles. Indeed, his criminal conduct, specifically with respect to guns, appeared to be escalating.

The court was not convinced by Michael's argument for a reduction for his acceptance of responsibility. It concluded that Michael was not forthcoming at trial, and

that making excuses for his behavior undercut any argument for acceptance. (GA1139, 1142).

The court also did not agree with Michael's argument that he had a low risk of recidivism because of his advanced age and because his past crime were so remote. (GA1113-1116). The court did, however, agree with his argument for lesser sentence based on his medical conditions. (GA1117-1118). The court concluded that Michael was unable to conform his conduct to the law, but agreed that he was a sick man. (GA1142).

In the end, the court considered all the information and imposed a sentence of 200 months' imprisonment – a sentence that was ten months below the bottom of the applicable Guidelines range. The ten-month difference was imposed to reflect Michael's medical condition. (GA1142).

Michael argues that his sentence of 200 months was substantively unreasonable for two reasons. First, he claims he "should have received a more lenient sentence because he suffers from several severe medical conditions." Michael's Brief at 36. Michael also claims that because of his age of 53, the "district court should have granted a lesser sentence based on his lower risk of recidivism." *Id.* at 39-40. These argument lack merit.

The court's decision not to afford Michael's medical conditions more weight did not result in substantive error. *See United States v. Cavera,* 550 F.3d at 191 (observing that "we do not consider what weight we would ourselves

have given a particular [sentencing] factor" but instead "whether the factor, as explained by the district court, can bear the weight assigned it under the totality of circumstances in the case"); *United States v. Fernandez,* 443 F.3d 19, 32 (2d Cir. 2006) ("The weight to be afforded any argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented").

Michael does not claim, and nothing in the record indicates, that the court failed to consider Michael's arguments for leniency. The court heard argument from Michael's lawyer, and Michael addressed the court, regarding a lower sentence and downward departure based on medical conditions. (GA1117-18, 1137-38). In fact, at sentencing, the court reviewed Michael's medical problems on the record, diagnosis by diagnosis, medication by medication, as set forth in the PSR, and also invited Michael to itemize them. (GA1079-80). The court also reviewed Michael's medical records from prison. (GA1141). The court concluded based on the record that a 200-month sentence, ten months below the applicable Guidelines range, would meet the goals of sentencing.

The court also listened to and rejected Michael's claim that he posed a low risk of recidivism based on his age and his remote criminal past. (GA1113-1116, 1142). Based on his extensive history of violent crimes, and the fact that he had been incarcerated most of his life and had committed the instant offense within one year of his

release from jail, the court did not abuse its discretion in rejecting this claim.

Thus, the court's non-Guidelines sentence of 200 months – ten months below the bottom of the applicable Guidelines range– was eminently reasonable. The fact that the defendant's sentence is below the advisory Guidelines range strongly undercuts any conclusion that it is unreasonably harsh. *Fernandez*, 443 F.3d at 27 ("in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances").

V. Eugene's *pro se* claims are mertiless.

Both parties raise numerous *pro se* claims that have no citations to the record or relevant case law, are difficult to decipher, and, nevertheless, are totally lacking in merit. *See United States v. Bonilla*, 618 F.3d 102, 107-108 (2d Cir. 2010) (identifying "as frivolous an appeal said to be totally lacking in merit, framed with no relevant supporting law, conclusory in nature, and utterly unsupported by the evidence.") (internal citations and quotations marks omitted). Eugene raises six such claims. He argues in his *pro se* brief that (1) the Government and its agents violated his due process rights in several different ways, *See* Eugene's *Pro Se* Brief at at 1-3; (2) the Government misrepresented evidence during its closing argument, *see id.* at 3-5; (3) the Government committed *Brady* and Jencks Act violations in discovery, *see id.* at 6-8; (4) the trial court abused its discretion in a variety of different ways, *see id.* at 8-11; (5) a Government witness perjured

himself at trial, *see id.* at 12-13; and (6) he was entrapped as a matter of law, *see id.* at 13-14.

A. The due process claims

Eugene claims that the Government and its agents violated his due process because (a) the Government allowed APM owners to tip off their employees about the investigation into the original firearms theft and to participate in the subsequent sting operation; (b) the agents showed Stevenson a photo lineup with Eugene's picture in it; (c) the agents relied on information provided by Stevenson, who Eugene claims was not reliable; (d) on the night of the controlled theft, ATF Special Agent Scott Riordan forced Stevenson, against his will, to open a door at APM for Michael and Harvin; and (e) the affidavit in support of Eugene's arrest warrant contained the false statement that Eugene had sold a firearm to another confidential informant on October 7, 2009 and that Special Agent Riordan testified in grand jury to the same false statement. *See* Eugene's *Pro Se* Brief at 1-3. In a related claim, Eugene maintains that the court erred by admitting evidence from Michael's cell phone because the agent violated his due process rights by searching Michael's cellular telephone without a warrant. *See* Eugene's *Pro Se* Brief at 10.

None of these claims were raised below, and, therefore, Eugene must establish plain error to prevail. He has failed to meet his burden to show that there was any error, much less, plain error. Moreover, he points to nothing in the factual record to support these claims, and

his underlying challenges to the Government's actions during its investigation or to the credibility of certain witnesses was better addressed during cross examination of these witnesses at trial. As to Michael's cellular telephone, the Government did indeed obtain a search warrant for it, (GA671, 674, 695), which Michael acknowledged at trial on the record under oath, (GA782). In addition, because Eugene did not file any motion to suppress evidence or motion to dismiss the indictment, he has waived any relief that theoretically could have been achieved through such motions. *See, e.g., United States v. Perez*, 575 F.3d 164, 166 (2d Cir. 2009) (noting "a claim alleging a defect in the indictment under Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure . . . is waived if not asserted in a motion to dismiss the indictment before trial"); *United States v. Yousef*, 327 F.3d 56, 144 (2d Cir. 2003) (holding that issues not raised in pre-trial suppression motion are waived, citing Fed. R. Crim. P. 12(b)(3) (requiring that motions to suppress evidence be raised prior to trial), and Fed. R. Crim. P. 12(f) (failure to raise 12(b) motions before trial constitutes waiver thereof)); *United States v. Crowley,* 236 F.3d 104, 110 (2d Cir. 2000) (finding a vagueness challenge to an indictment was waived because it was not raised before trial); *United States v. Salameh*, 152 F.3d at 125-126 (holding that district court did not abuse its discretion by admitting photo array as evidence of a prior identification where no defendant sought to suppress the arrays, because "defendants waived their right to challenge the prior identification as unduly suggestive") (citing Fed. R. Crim. P. 12(f)); *see also United States v. Mechanik*, 475 U.S. 66,

70 (1986) (finding that any defect in grand jury proceeding was rendered harmless by the guilty verdict").

B. Sufficiency of the evidence claims

Eugene appears to challenge the sufficiency of the evidence against him when he takes issue with the inferences that the Government asked the jury to draw in closing argument and, more generally, with the Government's alleged conflicting theories of his guilt. *See* Eugene's *Pro Se* Brief at 3-6. The jury, however, was entitled to draw its own inferences from the evidence before it, and to determine the weight of the evidence and the credibility of witnesses. In addressing a sufficiency of the evidence challenge on appeal, this Court "must credit every inference that could have been drawn in the government's favor, . . . view the evidence as a whole," and "defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Applins*, 637 F.3d 59, 76 (2d Cir. 2011). Here, as set forth in the factual statement of the evidence above, there was sufficient evidence to support the jury's findings of guilt as Eugene. The recorded telephone calls between Stevenson and Eugene, along with the other corroborating evidence, which included Stevenson's testimony, telephone records, and physical surveillance, showed that Eugene actively planned the theft of firearms from APM and recruited his own father to help carry out the plan.

In a related argument, Eugene maintains that Stevenson committed perjury when he testified about numerous factual issues relating to the initial theft of firearms from APM in August 2009, which conduct pre-dated the charged conduct and formed the basis for Stevenson's own guilty plea. *See* Eugene's *Pro Se* Brief at 12-13. The jury, however, is entitled to make credibility determinations and was free to accept or reject Stevenson's testimony. *See United States v. v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993) (rejecting defendant's sufficiency challenge, which included the claim that the witnesses against him were committing perjury, because, not only was perjury claim unsupported, but any argument that the witnesses' testimony should not have been credited is an argument for the jury, not a ground for reversal on appeal.").

C. Discovery claims

Eugene assets, without factual support, that "the Government violated Brady and Jencks, by non-disclose[d] and suppressed evidence that was favorable to the Defense." Eugene's *Pro Se* Brief at 6. Specifically, Eugene claims that the Government suppressed evidence of APM's alleged involvement in the prior theft of firearms from its facility, the record of transport of the firearms between APM and the manufacturer of the firearms, Stevenson's full criminal record, a second telephone call on October 19, 2009 between Eugene and Stevenson, the text messages from Stevenson's phone and the full record of Stevenson's cooperation agreement. *See id.* at 7. He asks that this Court grant him a new trial.

Eugene raised none of these claims below, and, therefore, there is absolutely no factual record to support them on appeal. A new trial is not warranted. The Government fully complied with its ongoing discovery obligations in this case and turned over all information covered by *Brady*, the Jencks Act, and the district court's standing discovery rules. To the extent that any defendant wanted more information about items that had already been disclosed in discovery, the Government provided such information despite the fact that it was not obligated to do so. Here, Eugene makes a conclusory allegation that certain information was not disclosed. In fact, the information to which he refers either did not exist or was disclosed in its entirety.

D. Entrapment claims

Eugene argues that the district court abused its discretion by admitting, as predisposition evidence, Stevenson's testimony that he had given two APM guns to Eugene in August 2009, and evidence of Eugene's criminal history. He also claims that he was entrapped as a matter of law.

First, plain error review applies to the evidentiary claims because they were not raised below, and Eugene has failed to establish any error at all. Stevenson testified that he had previously given two guns he had stolen from APM to Eugene. (GA417-18, 557). This evidence was relevant to the charges against Eugene because Eugene's defense to these charges was that he was induced by the Government to commit the crime. If credited, the fact that

Stevenson had previously given Eugene two stolen weapons from APM established that Eugene was predisposed to steal firearms from APM when Stevenson discussed that prospect with him in October 2009.

The same is true for the evidence of Eugene's prior convictions. Each prior felony conviction that was admitted involved the unlawful possession of a firearm, (GA686), and, therefore, was relevant predisposition evidence. *See United States v. Pagan*, 721 F.2d 24, 30-31 (2d Cir. 1983) (once a defendant raises the defense of entrapment, evidence of prior convictions *relevant* to the issue of predisposition may be introduced by the government in rebuttal); *United States v. Dyman*, 739 F.2d 762, 770 (2d Cir. 1984) (a jury may "consider evidence of the prior conduct of a defendant, including his criminal record, if any" on the issue of predisposition). Moreover, the evidence of Eugene's prior felony convictions was admitted *by agreement*. (GA937).

Eugene also claims, as he did at trial, that he was entrapped as a matter of law. *See* Eugene's *Pro Se* Brief at 13-14. The relevant facts are set forth above in the Statement of Facts, and the governing law and standard of review are set forth above in section II.B. The evidence the jury was entitled to credit, viewed in the light most favorable to the Government, demonstrates that the Government did not induce Eugene. Instead, the evidence shows that it was Eugene who had initiated the crime. It was Eugene who initially contacted Stevenson in August to inquire about the scheme to steal guns, (GA417, 419-20, 446-47), had continued to call Stevenson about the

scheme, (GA418-19, 421-22), and, when, Stevenson called Eugene in October, continued organizing his scheme to steal guns from APM. (GA201, 418-19, 683-85; Exs.4A-4G). This was a continuing course of conduct beginning in August and continuing into October. And it was all initiated by Eugene. Indeed, after Stevenson called Eugene on October 19, 2009 to discuss an "opportunity," (GA458-59; Ex.4A), Eugene immediately told Stevenson to come to his apartment, asked him questions about the layout of APM, and began to devise a scheme to steal the firearms. (GA217, 221-23, 461-69; Ex.4B). Thus, the Government did not induce Eugene to commit the crime. *See, e.g.*, *United States v. Thompson*, 130 F.3d 676, 690-691 (5th Cir. 1997) ("The government's presentation of an opportunity for a defendant to commit a crime, without more, is not inducement") (citing *Jacobson v. United States,* 503 U.S. 540, 550 (1992)).

Even assuming *arguendo* that Eugene established inducement by a preponderance of the evidence, Eugene's ready response to the inducement and his existing course of criminal conduct similar to the crimes for which he is charged showed that he was predisposed to commit the crime. On October 19, when Stevenson called Eugene about the "opportunity," Eugene did not hesitate. He immediately told Stevenson to come over and started to plan the theft of the guns. He pressed Stevenson to show him the layout at APM, and the following morning, he was in the vicinity of APM when Stevenson called him to meet. (GA17-20, 22-23, 217, 221-23, 461-69, 472-73, 475-80; Exs.4B, 4C, 4D). After meeting Stevenson at APM, Eugene told Stevenson he was setting up the theft.

(GA482; Ex.4D-1). When Stevenson later called and changed the day of the theft, moving it earlier to that night, Eugene did not hesitate and adjusted his plan accordingly. (Ex.4D-1). In fact, it was Eugene who called Stevenson later to make sure Stevenson would be at APM that night. (Ex.4E). Further, when Michael could not get into APM that night, Eugene immediately called Stevenson and got instructions from him. (GA487, 720-21; Ex.4G). The evidence established that Eugene aggressively pursued the opportunity to steal the firearms from APM. *See Brand*, 467 F.3d at 192-193 (noting that "when a suspect *promptly* avails himself of a government-sponsored opportunity to commit a crime, . . . it is unlikely that his entrapment defense would have warranted a jury instruction"); *Jacobson v. United States*, 503 U.S. 540, 549-550 (1992) (explaining "in a more elaborate 'sting' operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition"). Moreover, the entire sting operation occurred over a period of only three days. *See Brand*, 467 F.3d at 192-193 (holding based on the defendant's "*prompt* response to the government's single invitation to him to purchase child pornography, the jury could rationally find that he possessed the requisite predisposition beyond a reasonable doubt," noting that "[s]uch was not a permissible inference in *Jacobson* since, in that case, it took over two and one-half years of various governmental efforts directed toward

the defendant before he placed an order for child pornography").

Finally, the Government offered additional evidence to support its claim that Eugene was predisposed to commit this crime. The evidence established that Eugene was a two-time convicted felon, each conviction involving the unlawful possession of a firearm, (GA686), that Stevenson had seen Eugene with guns on a daily basis when he had lived with Eugene and Stevenson's sister, (GA415-16), and that Stevenson had previously given two stolen APM guns to Eugene, (GA417-18, 557). Thus, there was sufficient evidence for the jury to find that Eugene possessed the requisite predisposition beyond a reasonable doubt, and Eugene's claim that he was entrapped fails.

E. Sentencing claims

Eugene challenges two enhancements that he received at sentencing. He claims that the court erred in awarding a two-level increase for his role in the offense and in awarding a six-level enhancement because the offense involved twenty-nine firearms. *See* Eugene's *Pro Se* Brief at 9. These claims are meritless.

As to role, Eugene claims that the court erred in applying the two-level enhancement because he did not control or manage Stevenson, and the evidence was vague as to the role that he played in the recruitment and supervision of his co-conspirators. The district court, however, did not find that the role enhancement was warranted based on Eugene's relationship with Stevenson,

but rather based on his relationship with Michael. (GA1171, 1176-77). Specifically, the court found that Eugene "utilized affirmatively all of the information that he had obtained from Stevenson, developed the plan, intended to recruit people to go in there, and then when the people went in there, he was on call to handle the execution of the theft, specifically was called upon to do that when the question arose about the door they were attempting to use being locked." (GA1211). The court also stated that, "in terms of recruitment, there is only one way Michael Stinson came into this operation that night and that was through the defendant," (GA1186), and "the evidence also was that he [Michael] called Eugene Stinson when he couldn't find the right door, Eugene Stinson called Stevenson saying, what's the story on the doors, and he gave him the information, which Eugene Stinson then relayed back to Michael as to which door he should go into." (GA1187). "So, it seems to me that there is just no other explanation in the evidence other than Eugene Stinson recruited Michael Stinson to do the job that night and that he was supervising how that would take place by being the coordinator of information between Michael Stinson and himself and himself and Stevenson when the information needed to be cleared up." *Id.*

These findings were grounded in the evidence introduced at trial, which showed that Eugene (1) set up the theft of firearms with Stevenson, (GA217, 221-23, 461-69); (2) met with Stevenson at Eugene's apartment and at APM, where he obtained information about when, where, and how to enter APM to steal the guns, *id.*; (3) relayed that information to his father, Michael, who then

appeared at APM at the correct date, place, and time, with Harvin, (4) called Stevenson when Michael could not open the door, and (5) relayed information to Michael about the correct door to use to access APM. (GA231-32, 487, 490-92, 720-24). The record amply supports the court's ruling that Eugene qualified for a two-level enhancement for role. *See Hertular*, 562 F.3d at 448-49 (holding a defendant is properly considered a manager or supervisor if he "'exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or to supervise lower-level participants.'") (quoting *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002)); *see also United States v. Garcia*, 413 F.3d 201, 223 (2d Cir. 2005).

Eugene also claims that the district court erred in awarding a six-level enhancement because the offense involved twenty-nine firearms. At sentencing, the court found that all twenty-nine firearms were attributable to Eugene based on the "video that we saw of the theft and based on Michael Stinson's testimony that he intended to go back" and because Eugene was a co-conspirator. (GA1167). This enhancement was appropriate.

Although Eugene was charged with the twenty-nine firearms in the conspiracy count, but not in the theft count, all twenty-nine were attributable to him because they were all involved in the conspiracy offense, within the meaning of U.S.S.G. § 2K2.1(b)(1). *See* U.S.S.G. § 2K2.1, comment.(n.5) (includes "those firearms that were unlawfully sought to be obtained, unlawfully possessed . . . .). In addition, as set forth in above in the Statement of

Facts, the evidence established that Eugene organized the theft and recruited Michael to help him, and that, on the night of the theft, Michael and Harvin snuck into APM in the middle of the night, packed up twenty-nine guns in four duffle bags and carried sixteen of them out of APM with every intent to return immediately and steal the remaining thirteen firearms. *See, e.g.*, *United States v. Santoro*, 159 F.3d 318, 321 (7th Cir. 1998) ("When a court determines the number of firearms involved in an offense under U.S.S.G. § 2K2.1(b)(1), it looks to the relevant conduct section of the guidelines . . . to determine how many firearms come within the same course of conduct or perhaps a common scheme or plan."). Thus, the court properly concluded that a six-level enhancement applied.

Finally because the court imposed the same sentence as a non-Guidelines sentence, any guideline calculation error was harmless. (GA1217). *See United States v. Selioutsky*, 409 F.3d 114, 118 n.7 (2d Cir. 2005) (noting that this court could forgo review of the correctness of a departure if there was "a sufficient basis for believing that the same sentence would have been imposed as a non-Guidelines sentence" because in such a case "any error in using departure authority to select the sentence that was imposed would be harmless").

F. Motion for mistrial based on publicity

Finally, Eugene claims that the court abused its discretion by denying a motion for a mistrial made by Michael's lawyer at trial, which was based on a newspaper article that was published during the trial. *See* Eugene's

Pro Se Brief at 11. At trial, the Government alerted the court that a local newspaper had just printed an article, which recited the events of the trial and contained Michael's criminal history; the Government suggested that the court instructed the jurors not to look at the article. (GA234-35). Thereafter, the court reminded each juror "of [its] direction after you were selected for this jury, and that is not to read anything in the papers, not to listen to any media coverage, not to talk to anyone or be spoken to by anyone about this." (GA379). The court confirmed that the jurors had complied with its direction, and specifically warned the jurors not to read the local paper. (GA379-80).

Later that day, Michael's lawyer moved for a mistrial "based upon the article in the New Haven Register that specified my client's prior felony convictions. Even though the jury said they didn't hear it, I believe it still may prejudice them against him." (GA852-53). The court responded, "Well, if they didn't hear it, it's not going to prejudice them. I did tell them that if there was something that they could tell us. They have not read anything. And, further, I'm not sure I understand how it would prejudice him since his prior convictions are part of the evidence. So, I'm going to deny a motion for a new trial on that basis." (GA853).

The court did not abuse its broad discretion in denying the motion for a mistrial. First, there was no evidence in the record that any juror had been exposed to the publicity. Second, the sole claim of prejudice as to the publicity related to information about Michael's criminal record, not

information about Eugene. Third, as the district court noted, the jury was going to learn about Michael's criminal record both as predisposition evidence and as evidence related to his credibility as a witness. *See, e.g., United States v. Gigante,* 729 F.2d 78, 82 (2d Cir. 1984) (listing four factors to be considered by the trial judge regarding alleged prejudicial publicity: "(1) the publicity does not focus directly on the issue of the defendant's guilt or innocence with respect to the charges in the ongoing trial, (2) much of the potentially prejudicial matter has been adduced as competent evidence at trial, (3) the trial judge has taken prompt action to determine the effect of the publicity on the jurors, and (4) the judge has given or offered to give cautionary instructions. . ."); *United States v. Weber*, 197 F.2d 237, 239 (2d Cir. 1952) (finding no error in denial of a motion for mistrial where local newspapers printed stories regarding the empaneling of the jury, allegations of a prior criminal record for the defendant, and a derogatory cartoon about the defendant, reasoning that at trial the appellant had not asserted that any of the jurors had even read the articles and did not ask that they be interrogated about the newspaper printings).

VI. Michael's *pro se* claims are meritless

Michael sets forth eleven arguments in his *pro se* brief, some of which are identical to arguments raised by Eugene in his *pro se* brief. As with Eugene's *pro se* arguments, many of Michael's arguments are difficult to decipher and are utterly devoid of citations to the record. In responding to the claims, the Government has attempted to group

them in terms of the general nature of the claims or the general nature of the relief requested.

A. Due process and jurisdictional claims

Michael raises a number of claims that either challenge the case on jurisdictional grounds or maintain that his constitutional rights were violated.

First, like Eugene, Michael claims that the Government and its agents violated his due process rights when an ATF special agent allegedly forced Stevenson, against his will, generally to participate in the controlled theft and, specifically, to open a door at APM for Michael and Harvin on the night of the theft. *See* Michael's *Pro Se* Brief at 1-2. Like Eugene, Michael did not file any motion to suppress in his case. Thus, he has waived this claim. *See United States v. Yousef*, 327 F.3d at 144; Fed. R. Crim. P. 12(b)(3) (requiring that motions to suppress evidence be raised prior to trial); Fed. R. Crim. P. 12(f) (failure to raise a 12(b) motion before trial constitutes waiver thereof). Moreover, to the extent that Michael wanted to raise this claim below, he could have done so by attacking the credibility of the Government's agents and Stevenson regarding Stevenson's willingness to participate in the controlled theft.

Second, Michael, like Eugene, claims that the district court erred by admitting evidence from his cellular telephone, arguing that his due process rights were violated when the agent searched the telephone without a warrant. *See* Michael's *Pro Se* Brief at 5, 9. Even though

this argument was waived because it was not raised below, it can be summarily rejected because the Government did obtain a search warrant for the cell phone, (GA671, 674, 695), which Michael himself acknowledged at trial. (GA782). To the extent that Michael is claiming that the Government presented any other evidence against him that should have been suppressed, *see* Michael's *Pro Se* Brief at 9, he has failed to set forth what evidence that was or the legal theory supporting suppression.

Third, Michael claims that the indictment contains duplicative counts against him and, as such, is multiplicitious and violates his Fifth Amendment rights under the Double Jeopardy Clause so that dismissal of the indictment is warranted. *See* Michael's *Pro Se* Brief at 13-16. Michael waived this claim by not raising it before trial. *See, e.g., United States v. Perez*, 575 F.3d 164, 166 (2d Cir. 2009) (noting "a claim alleging a defect in the indictment [under Fed. R. Crim. P. 12(b)(3)(B)] . . . is waived if not asserted in a motion to dismiss the indictment before trial"). In any event, the indictment is not multiplicitious. The "Supreme Court has long held that [a conspiracy and the underlying substantive count] are separate and distinct offenses that permissibly may result in the imposition of cumulative sentences." *United States v. Bicaksiz*, 194 F.3d 390, 394-395 (2d Cir. 1999) (brackets added) (citing *Callanan v. United States,* 364 U.S. 587, 593, (1961)). Moreover, each count has at least one element that neither of the other two counts has. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("the test to be applied to determine whether there are two offenses or only one, is whether each provision requires

proof of a fact which the other does not"); *see also* Fed. R. Crim. P. 12(b)(3). The felon-in-possession count is the only count that has, as two of its elements, the knowing possession of a firearm and the existence of a prior felony conviction. The conspiracy count is the only count that has as an element the existence of an agreement between two or more people. The theft count is the only count that has, as two of its element, the stealing of a firearm and the fact that the stolen firearm came from the inventory of a federal firearms licensee.

Finally, Michael claims that the district court lacked subject matter jurisdiction to hear the case because the firearms in question did not move in interstate commerce *after* they were stolen. *See* Michael's *Pro Se* Brief at 16-17. Michael misunderstands the law. The interstate commerce element of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 922(u) is met if "the firearm allegedly possessed or received by the defendant had at some point *previously* traveled across a state line." *United States v. Sanders*, 35 F.3d 61, 62 (2d Cir. 1994) (emphasis added). ATF Special Agent Kurt Wheeler testified at trial that he had examined the firearms charged in the indictment and that each of them had been manufactured either in Texas or Minnesota, had been shipped to APM from Vermont, and thus, when they were seized in Connecticut, had previously traveled across state lines. (GA390-91).

B. Discovery claim

Like Eugene, Michael claims that the Government failed to provide him with certain discovery material. In

particular, he argues that the Government failed to turn over any records pertaining to Stevenson's mental health. *See* Michael's *Pro Se* Brief at 4-5. Like Eugene, Michael did not raise this claim below and points to no evidence in the record to support his claim. The Government fully complied with its ongoing discovery obligations in this case and, with respect to Stevenson, turned over all information which could have even remotely qualified as discoverable under *Brady*, Jencks and *Giglio*. The defendants made significant use of this information in attacking Stevenson's credibility and cross examining him extensively.

C. Evidentiary claims

Michael raises several arguments which can best be characterized as claims that certain evidence was improperly admitted against him or improperly used at trial.

First, he maintains that the Government misrepresented evidence by asserting at trial that a particular firearm – one bearing serial number ABN2T-100696 – was stolen from APM. *See* Michael's *Pro Se* Brief at 3-4. The record establishes, however, that a firearm bearing serial number ABN2T-100696 was one of the firearms that Michael and Harvin attempted to steal from APM and that ATF seized from them at the time of their arrest. (GA487-88, 735, 850; Court Ex. 1A).

Second, Michael claims for the first time on appeal that the district court erred by allegedly suppressing evidence

that would have undermined the Government agent's credibility. *See* Michael's *Pro Se* Brief at 8-9. Michael points to nothing in the record to support this claim, and without such any citations to the record, it is impossible to respond to the argument.

Third, Michael contends for the first time on appeal that the district court, in front of the jury, showed partiality towards the Government and antagonism toward Eugene's counsel. *See* Michael's *Pro Se* Brief at 10-12. In support of his argument, Michael relies only on two examples. In one instance, the court, outside the presence of the jury, mildly chastised Eugene's counsel for criticizing the owner of APM for considering Stevenson to be a good employee despite the fact that he had stolen firearms and drank alcohol while on duty. (GA370). In another instance, the court suggested to the prosecutor, in front of the jury, how to rephrase a question so that it was not objectionable. Specifically, the court asked the prosecutor, during Stevenson's direct testimony, to substitute the word "information" for the word "idea" in a question asking Stevenson whether he had any "idea" who Eugene was planning to send to APM to steal the firearms. (GA503-04). Neither of these instances indicated partiality, and Michael has failed to establish in what manner the court's handling of these situations, one of which was not even in front of the jury, prejudiced him at all. *See United States v. Pisani,* 773 F.2d 397, 402 (2d Cir. 1985) (a conviction should only be reversed "if [this Court] conclude[s] that the conduct of the trial had so impressed the jury with the trial judge's partiality to the prosecution that this became

a factor in determining the defendant's guilt[.]"); *see also United States v. Rosa*, 11 F.3d 315, 343 (2d Cir. 1993).

Fourth, Michael argues that Stevenson perjured himself at trial. In support of his position, he quotes what he claims are two inconsistent statements in Stevenson's trial testimony regarding Stevenson's past cooperation with law enforcement. *See* Michael's *Pro Se* Brief at 6, 8. Here, the jury heard the testimony at trial in context and was free to accept or reject Stevenson's testimony. *See United States v. v. Rosa*, 11 F.3d at 341 (holding that defendant's perjury claim was unsupported, and his arguments attacking the witnesses' credibility is an argument for the jury, not for appeal).

D. Claims as to Government's closing argument

Michael also makes several arguments which appear to take issue with the Government's closing argument. "Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *United States v. Young*, 470 U.S. 1, 11 (1985); *accord United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) ("Reversal is an ill-suited remedy for prosecutorial misconduct . . . ."); *United States v. Burden*, 600 F.3d 204, 221 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 251 (2010) and *cert. denied*, 131 S. Ct. 953 (2011). To warrant reversal, prosecutorial misconduct must "'cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Carr*, 424 F.3d 213, 227

(2d Cir. 2005) (quoting *United States v. Shareef*, 190 F.3d 71, 78 (2d Cir. 1999)); *see also Shareef*, 190 F.3d at 78 ("Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egregious misconduct.'") (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974)).

First, he argues that the Government misrepresented at trial that Eugene aided and abetted Stevenson in the theft of firearms. *See* Michael's *Pro Se* Brief at 7. In support of this position, Michael relies on his own testimony that Eugene had nothing to do with the theft. *Id.* Michael also claims that Stevenson did not voluntarily participate in the controlled theft because the ATF agent physically forced him to open the door to APM on the night of the theft. This claim is meritless because the jury was entitled to draw its own inferences from the evidence before it, and determine the weight of the evidence and the credibility of witnesses. *See, e.g., United States v. Applins*, 637 F.3d 59 (2d Cir. 2011) (holding that, in considering sufficiency claims, the Court "defer[s] to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence.") (internal citations and quotation marks omitted). In other words, the jury was entitled to reject Michael's testimony regarding Eugene's involvement in the theft and to reject any suggestion that Stevenson was somehow forced or coerced by the Government into participating in the controlled theft.

Second, Michael claims that the Government stated incorrectly during its summation that, according to the testimony of the owner of APM, there was no scrap metal in the assembly room where the firearms were located. In fact, during its opening summation, the prosecutor, relying on the APM owner's direct testimony, stated that, according to him, there was no scrap metal in the assembly room. (GA972). During cross examination, however, the owner of APM had acknowledged that there could have been scrap metal in the assembly room. (GA355-56). At the time the comment was made during closing argument, Michael failed to object to it. In addition, during his closing argument, Michael had every opportunity to rebut this prosecutor's claim by emphasizing the APM owner's concession on cross examination. Moreover, both the district court and the prosecutor informed the jurors that the comments made during summation were not evidence, and that it was the jurors' recollection of the evidence that controlled. (GA885-86, 918-19, 956-57). Finally, Stevenson, who was the employee that loaded scrap metal for APM, testified that there was no scrap metal in the assembly room, (GA413, 501-02, 552-53), and the videotape of the theft of firearms showed that there was no scrap metal located in the assembly room on the night of the theft, (Ex.1-J). Thus, in light of all of the evidence in the case, this one comment was not "so egregious that, when viewed in the context of the entire trial, it substantially prejudiced [Michael]." *United States v. Newton*, 369 F.3d 659, 680 (2d Cir. 2004).

Third, Michael claims that the Government's rebuttal argument violated the "Golden Rule" when the prosecutor

asked, in the context of discussing whether the defendants were induced to engage in the theft of firearms, "What would persuade you to do this?" (GA1014); *see* Michael's *Pro Se* Brief at 12-13. Defense counsel objected at the time, however, and the prosecutor immediately withdrew the comment and rephrased the question as follows: "What would persuade an innocent person to commit the crime." As rephrased, this question was proper, paraphrased the district court's jury instruction on entrapment and drew no objection. (GA1015). The question, as originally phrased, was immediately withdrawn and was not "so egregious that, when viewed in the context of the entire trial, it substantially prejudiced [Michael]." *United States v. Newton*, 369 F.3d 659, 680 (2d Cir. 2004)

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: August 30, 2011

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 21,344 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules. On August 30, 2011, the Government has filed a motion to submit an oversized brief of no more than 22,000 words to enable it to respond to the four different appellant and *pro se* opening briefs.

FELICE M. DUFFY
ASSISTANT U.S. ATTORNEY

ADDENDUM

Title 18, United States Code, Section 3553

(a) Factors to be considered in imposing a sentence.–The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for–

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as

provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Title 18, United States Code, Section 922(g)

It shall be unlawful for any person– (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . . to ship or transport in interstate or foreign commerce, or possess in

or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18, United States Code, Section 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection–

(A) the term "serious drug offense" means–

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one

year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Connecticut General Statutes § 53a-101

(a) A person is guilty of burglary in the first degree when (1) such person enters or remains unlawfully in a building with intent to commit a crime therein and is armed with explosives or a deadly weapon or dangerous instrument, or (2) such person enters or remains unlawfully in a building with intent to commit a crime therein and, in the course of committing the offense, intentionally, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone, or (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein.
(b) An act shall be deemed "in the course of committing" the offense if it occurs in an attempt to commit the offense or flight after the attempt or commission.
(c) Burglary in the first degree is a class B felony provided any person found guilty under subdivision (1) of subsection (a) shall be sentenced to a term of

imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

Connecticut General Statutes § 53a-133

A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Connecticut General Statutes § 53a-134

(a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or (2) is armed with a deadly weapon; or (3) uses or threatens the use of a dangerous instrument; or (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude

a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

(b) Robbery in the first degree is a class B felony provided any person found guilty under subdivision (2) of subsection (a) shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court.

Federal Rules of Criminal Procedure, Rule 12

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(b) Pretrial Motions.

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information--but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

United States Sentencing Guideline, § 4B1.4

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from § 4B1.1 (Career Offender) if applicable; or

(3)(A) 34, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. 5845(a); or (B) 33, otherwise.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or § 4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in § 4B1.2(a), or a controlled substance offense, as defined in § 4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

United States Sentencing Guideline, § 4B1.2

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that– (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.